(32,483)

(32,525)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1926.**

---

## No. 916

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

*vs.*

C. H. PRIESTER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

---

## No. 958

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

*vs.*

C. H. PRIESTER

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

---

INDEX.


| | Page |
|---|---|
| Record from circuit court of Butler County | 3 |
| Caption | 3 |
| Complaint | 3 |
| Pleas 1 to 5 | 5 |
| Demurrer to pleas 3, 4, and 5 | 13 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 29, 1927

Page

Replication to plea 4 ..... 14
Demurrer to replication to plea 4 ..... 15
Amendment to complaint ..... 16
Demurrer to amendment to complaint ..... 18
Amendment to complaint ..... 20
Plea 6 ..... 21
Demurrer to pleas and to amended complaint ..... 23
Judgment ..... 24
Amended pleas 1 to 5 ..... 25
Demurrer to pleas 2, 3, 4, and 5 ..... 33
Charge to jury ..... 35
Defendant's requested charges refused ..... 39
Judgment ..... 44
Motion for new trial ..... 45
Order overruling motion for new trial ..... 47
Bill of exceptions ..... 48
Caption ..... 48
Testimony of Senotie Harrison ..... 48
C. H. Priester ..... 49
Maud Miller ..... 54
Exhibit—Telegram from C. H. Priester to J. K. Lewis .. 55
Exhibit in Evidence—Certified copy of rules and regulations of Western Union Telegraph Co ..... 61
Exhibit in Evidence—Report and order of I. C. C. in case of Clay County Produce Co. vs. Western Union ..... 80
Testimony of Mike Dantoni ..... 97
Exhibit "A"—Telegram from C. H. Priester to J. K. Lewis Co ..... 99
Testimony of T. J. Engel ..... 102
Testimony of C. C. May ..... 107
Charge to jury ..... 108
Defendant's requested charges refused ..... 113
Verdict and judgment ..... 118
Motion for new trial ..... 119
Order overruling motion for new trial ..... 121
Order settling bill of exceptions ..... 121
Bond on appeal ..... 122
Citation and service ..... 123
Record from court of appeals of Alabama ..... 124
Assignments of error ..... 124
Opinion, Sanford, J ..... 127
Judgment ..... 129
Application for rehearing ..... 130
Order denying rehearing ..... 134
Clerk's certificate ..... 135
Proceedings in supreme court of Alabama ..... 136
Petition for writ of certiorari ..... 136
Order denying petition for writ of certiorari ..... 147
Clerk's certificate ..... 148
Orders allowing certiorari ..... 149

## ORGANIZATION OF COURT

At the regular term of the Circuit Court of Butler County, Alabama, at which the officers authorized by law, to hold or serve such Court, were serving, the following proceedings were had in the cause styled, C. H. Priester vs. Western Union Telegraph Company, a corporation.

## COMPLAINT

C. H. Priester, Plaintiff,

vs.

Western Union Telegraph Company, a corporation, Defendant.

The Plaintiff claims of the defendant the sum of Three Hundred and Fifty-two and 10|100 ($352.10) Dollars, for that on, to-wit: December 16, 1919, plaintiff delivered to defendant's agents at Fort Deposit, Ala., and Greenville, Alabama, for transmission and delivery to one J. K. Lewis at New Orleans, La., the following message, viz: "I offer you 1,000 or 1500 lbs. Frotcher pecans at 50 cents f. o. b. Ft. Deposit. Answer. (signed) C. H. Priester."

Plaintiff further avers that he paid the defendant's agent for the transmission of said message and that the defendant through its agents and servants undertook and agreed to transmit said message correctly over its lines and wires to the said J. K. Lewis, but that in so doing it negligently failed to transmit and deliver said message and that through the negligence of the agents and servants of the defendant said message above named was changed and altered in its transmission and delivery so that when delivered to the said J. K. Lewis it read in substance as follows: "Ft. Deposit, Ala. 11.38 A. M. Dec. 16, 1919. To J. K.

Lewis, N. O. La. Offer you thousand or fifteen hundred pounds Frotcher at Fifteen cents F. O. B. Deposit. Answer. C. H. Preister."

Plaintiff further alleges that after receiving said message in its altered form, as last hereinabove set forth, the said J. K. Lewis wired plaintiff over and through defendant's lines in substance as follows: "New Orleans, La. 4.05 P. Dec. 16, 1919, C. H. Priester, Ft. Deposit, Ala. Will take fifteen hundred pounds pecans offered today or tomorrow. Expense shipment. J. K. Lewis."

Plaintiff further avers that after receiving the above message from the said J. K. Lewis and without knowing his telegram to said Lewis had been so changed before delivery to him as to read fifteen instead of fifty cents, and understanding that said Lewis had agreed to buy the pecans at fifty cents per pound, as offered in the message when delivered to defendant's agents for transmission, plaintiff shipped and delivered to said Lewis at New Orleans 12 sacks of Frotcher pecans weighing, to-wit: 1006 pounds, it being the understanding of the plaintiff that said Lewis had accepted his offer of said pecans at fifty cents per pound and would pay for same at said price.

Plaintiff further alleges that after receiving said pecans the said Lewis paid him the sum of $150.90, same being the price of said pecans at 15 cents per pound, and has failed and refused to pay any further sum for the same.

Wherefore plaintiff avers that by reason of the alteration and change in said message above named so as to read fifteen cents instead of fifty cents per pound for the pecans sold and delivered to Lewis, all of which was done through the negligence of defendant's servants and agents, plaintiff has sustained loss and damage in the sum above claimed, together with the interest thereon, and also dam-

ages for the sending of said telegrams, with interest thereon.

POWELL & HAMILTON,
Plaintiff's Attorneys.

Plaintiff demands a jury trial in the above cause.

POWELL & HAMILTON,
Plaintiff's Attorneys.

Filed July 21st, 1920.

## PLEAS.

C. H. Preister, Plaintiff.

vs.

Western Union Telegraph Company, a corporation, Defendant.

No. 6496 In Circuit Court of Butler County, Alabama.

Now comes the defendant, by its attorneys, and for answer to the complaint herein, pleads:

1. The general issue.

2. Not guilty.

3. For further plea, this defendant says: that the telegraphic message described in the complaint and on which this action is based was an interstate message, to be sent from a point in the State of Alabama, to-wit: Fort Deposit, Alabama, to a point in the State of Louisiana, to-wit: New Orleans, Louisiana, and was, as such, interstate commerce; that according to defendant's established rules, regulations and tariffs as the same were on file with the Interstate Commerce Commission on December sixteenth, Nineteen Hundred and Nineteen, and have ever since been, and are

still maintained, messages are classified among other classifications, into "repeated" and "unrepeated" messages, a repeated message being a message which the defendant agrees that the office of destination shall transmit back, after receiving it, to the point of origin in order to avoid mistakes; that in the case of unrepeated messages the defendant assumes no liability beyond the amount received for sending the same, while in the case of repeated messages defendant does not undertake to limit its liability to the amount received for sending the same, but assumes on the contrary liability for not exceeding fifty times the amount received for sending the message (except insofar as such liability may be further limited by other provisions of the contract); and for the additional work of repeating said message and the additional liability assumed in the case of a repeated message, the defendant, at all times mentioned, made and still makes an additional charge equal to one-half of the unrepeated message rate. That by the Act of Congress approved June eighteenth, Nineteen Hundred and Ten (36 Stat. L. 539), the Congress of the United States entered and assumed charge of the regulating of the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of state regulation or interference, and undertook and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred upon the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

That said message on which this suit is based was sent by the plaintiff as an unrepeated message, and the amount

paid defendant for sending the same was, to-wit: the sum of One Dollar: Wherefore, the defendant says it is only liable to the plaintiff in said sum of One Dollar, with interest thereon from December sixteenth, Nineteen Hundred and Nineteen.

4. For further plea, this defendant says that at the time said telegraphic message was received by it for transmission, it had on file with the Interstate Commerce Commission its rules governing the acceptance of messages for transmission in which, among other things, it is provided: "when presented at an office of the Company, each message for transmission shall be written upon the form provided by the Company for that purpose or shall be attached to such form by the sender or his agent so as to leave the printed heading in full view above the message." That said message was written on one of the blanks of the Company containing the said rule above quoted; that at said time and for a long time prior thereto, by defendant's established rules, regulations and tariffs messages are classified, among other classifications, into Day Messages, Night Letters, Night Messages,. and Day Letters; that all telegrams of whatsoever classification are sent subject to the terms expressed on the back of the telegraph blanks on which such messages are written, and that it was provided on the back of the blanks for Day Messages that: "To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated message rate is charged in addition"; that unless otherwise indicated on the face of said blanks, all messages are sent as unrepeated messages and paid for as such, and that in consideration of such classification and difference in rates it was agreed between the sender of the message and the telegraph Company, that the defendant should not

be liable for mistakes or delays in the transmission or delivery or for nondelivery of an unrepeated message beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for nondelivery of any repeated message beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

That it was a term and condition of said contract, subject to which and subject to which only, the message sued on in this case was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeated message beyond the amount received for sending the same, and that said message was an unrepeated message, and defendant was not directed or requested to repeat the same, and all that defendant received in exchange for its obligation in respect of said message was the sum of, to-wit: One Dollar, which was defendant's ordinary and reasonable charge for the transmission and delivery of such message without repetition, from the point of origin to the point of destination, including its delivery at destination. That by defendant's established rules, regulations and tariffs as the same were on file with the Interstate Commerce Commission on December Sixteenth, Nineteen Hundred and Nineteen, and have ever since been, and still are maintained and established, telegrams are classified, among other classifications, into repeated and unrepeated messages, a repeated message being a telegram which the defendant agrees that the office of destination shall transmit back, after receiving it, to the point of origin to avoid mistakes; that in the case of an unrepeated message the defendant assumes no liability beyond the amount received for sending the same, while in the case of repeated tele-

grams the defendant does not undertake to limit its liability to the amount received for sending the same, but assumes on the contrary liability for not exceeding fifty times the amount received for sending the message (except insofar as such liability may be further limited by other provisions of the contract), and for the additional work of repeating said message and the additional liability assumed in the case of a repeated message, the defendant, at all times mentioned, made and still makes an additional charge equal to one-half of the unrepeated message rate. That by the Act of Congress approved June eighteenth, Nineteen Hundred and Ten (36 Stat. L. 539), The Congress of the United States entered and assumed charge of the regulating of the field of interstate communication by telegraph and thereby removed and exempted such interstate communication by telegraph from the field of state regulation or interference, and undertook and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred upon the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

By reason of which, and all of the premises, the defendant says that the stipulation in the contract subject to which, and subject to which only, the telegram on which this suit is based was accepted, to the effect that the defendant's liability should not, in any event, exceed the sum of One Dollar, was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of Alabama, or any other State, so that the defendant ought not to be liable, in any event, in this action beyond the sum of One Dollar, the amount re-

ceived for sending said telegram, with interest thereon from December sixteenth, Nineteen Hundred and Nineteen.

5. For further plea, this defendant says that at the time said telegraphic message was received by it for transmission, it had on file with the Interstate Commerce Commission its rules governing the acceptance of messages for transmission in which, among other things, it is provided: "All messages accepted for transmission shall be received subject to the classifications hereinafter set forth, and to the conditions and stipulations adopted for each of the respective classifications. When presented at an office of the company, each message for transmission shall be written upon the form provided by the company for that purpose, or shall be attached to such form by the sender or his agent, so as to leave the printed heading in full view above the message". That said message was telephoned by the plaintiff from Fort Deposit, Ala., to the office of the defendant at Greenville, Ala., and by defendant's operator or clerk in its office at Greenville was written down on one of defendant's regular blanks provided by the company for that purpose. That at said time and for a long time prior thereto, by defendant's established rules, regulations and tariffs messages are classified, among other classifications, into Day Messages, Night Letters, Night Messages, and Day Letters; that all telegrams of whatsoever classification are sent subject to the terms expressed on the back of the telegraph blanks on which such messages are written, and that it was provided on the back of the blanks for Day Messages that: "To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one half the unrepeated message rate is charged in addition;" that unless otherwise indicated on the face of said blanks, all messages are sent as unrepeated messages and paid for as such, and that in consideration of such

classification and difference in rates it was agreed between the sender of the message and the telegraph company that the defendant should not be liable for mistakes or delays in the transmission or delivery or for the nondelivery of an unrepeated message beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for nondelivery of any repeated message beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines, nor for errors in cipher or obscure messages.

That it was a term and condition of said contract, subject to which and subject to which only, the message sued on in this case was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeated message beyond the amount received for sending the same, and that said message was an unrepeated message, and defendant was not directed or requested to repeat the same, and all that defendant received in exchange for its obligation in respect of said message was the sum of, to-wit: One Dollar, which was defendant's ordinary and reasonable charge for the transmission and delivery of such message without repetition, from the point of origin to the point of destination, including its delivery at destination. That by defendant's established rules, regulations and tariffs as the same were on file with the Interstate Commerce Commission on December, 16, 1919, and have ever since been, and still are maintained and established, telegrams are classified, among other classifications into "repeated" and "unrepeated" messages, a repeated message being a telegram which the defendant agrees that the office of destination shall transmit back, after receiving it, to the point of origin in order to avoid mistakes; that in the case of an unrepeated message the defendant assumes no lia-

bility beyond the amount received for sending the same, while in the case of repeated messages the defendant does not undertake to limit its liability to the amount received for sending the same, but assumes on the contrary liability for not exceeding fifty times the amount received for sending the message (except insofar as such liability may be further limited by other provisions of the contract), and for the additional work of repeating said message and the additional liability assumed in the case of a repeated message the defendant, at all times mentioned made and still makes an additional charge equal to one-half of the unrepeated message rate. That by the Act of Congress approved June 18, 1910 (36 Stat. L. 539), the Congress of the United States entered and assumed charge of the regulating of the field of interstate communication by telegraph from the field of state regulation or interference, and undertook and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred upon the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains. That said message on which this suit is based was an interstate message.

By reason of which and all of the premises, the defendant says that the stipulation in the contract subject to which and subject to which only the telegram on which this suit is based was accepted, to the effect that the defendant's liability should not, in any event, exceed the sum of One Dollar, was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of Alabama, or any other state, so that the defendant ought not to be liable, in any event, in this action

beyond the sum of one dollar, the amount received for sending said telegram, with interest thereon from Dec. 16, 1920.

RUSHTON & CRENSHAW,
Attorneys for Defendant.

Filed September 4th, 1920.
Re-Filed April 3rd, 1923.

## DEMURRERS TO PLEAS 3, 4 & 5.

Comes the Plaintiff and demurs to defendant's plea three upon the following grounds:

1st. It is not averred that plaintiff at the time of sending the message had knowledge of the rules, regulations and tariff on file with the Interstate Commerce Commission as averred in said plea.

2nd. It is not averred that at the time of sending the telegram referred to plaintiff had knowledge that the rules, regulations and tariffs referred to in said plea were on file with the Interstate Commerce Commission or that he had any knowledge of the classification of message into "repeated" and "unrepeated" messages in the manner set forth and averred in said plea.

3rd. It is not averred that at the time of sending the message the plaintiff agreed to the rules, regulations and tariffs set forth in said plea or agreed that the message should be sent as an unrepeated message with the conditions as to liability as set forth in said plea.

4th. The said plea in and by its averments shows that the rules, regulations and tariffs therein referred to and the matters and things set up in said plea as a defense are

against public policy in that the contract sued on if limited by the matters and things set up in said plea would be a contract on the part of the plaintiff against its own negligence.

5th. It is shown in and by the averments of said plea that as to the contract sued on the rules, regulations and tariffs referred to in said plea and the matters and things set up therein are void and against public policy in that they limit the liability of the defendant against its own negligence.

Plaintiff demurs separately to the fourth and fifth pleas and for grounds of demurrer assigns separately to each of said pleas each of the grounds hereinabove assigned to defendants' third plea.

POWELL & HAMILTON,
Attorneys for Plaintiff.

Filed October 5th, 1920.

## REPLICATION TO PLEA 4

Comes the plaintiff and for replication separately to each of defendants special pleas 4 says:

1st. He joins issue on said plea.

2nd. For further replication to said plea plaintiff says: That at the time message referred to in the complaint was delivered for transmission by plaintiff, the defendant had no telegraph office in Fort Deposit, Alabama, and did not furnish blanks of the kind referred to in said pleas to persons in Ft. Deposit, Ala., who desired to send telegrams over defendants' wires, that the nearest convenient office defendant had for transmission of telegraphic messages was in Greenville, Ala., about 12 miles from Ft. Deposit,

that in order for patrons of the defendant in Ft. Deposit to send telegrams it was customary at the time the message in question was sent and long prior thereto, to send said message by long distance over the long distance phone, at Ft. Deposit, Ala., to defendant's operator at Greenville, Ala., that for this purpose the operator of the long distance phone at Fort Deposit was authorized to collect the charges of the defendant for transmission and plaintiff avers that when he went to send the message, he informed the telephone operator at Ft. Deposit of the message he desired to send, that she wrote the same on a piece of paper which said paper contained none of the rules and regulations or matters set up in said plea, that thereupon the operator phoned said message to Greenville, Ala., and plaintiff paid her defendant's charges therefor and plaintiff avers that at the time said message was transmitted and given to dedefendant as above set forth. he did not agree to send the telegram subject to the rules and regulations and matters set up in said plea, that he did not know of said rules and regulations and matters, but that said message was given for transmission as herein set forth.

POWELL & HAMILTON,
Attorneys for Plaintiff.

Filed October 5th, 1920.

## DEMURRERS TO REPLICATION TO PLEA NO. 4

Now comes the defendant and demurs to the special replication, number two to plea four, on the following grounds:

1st. Said replication neither traverses nor confesses and avoids the averments of the plea, to which it is addressed.

2nd. Said replications presents no answer to the plea.

3rd. It does not aver the telephone operator was the agent of the plaintiff.

4th. Because it clearly appears that the telephone operator was the agent of the plaintiff.

5th. Because it is immaterial whether or not plaintiff knew of defendant's regulations on file with the Interstate Commerce Commission.

6th. Because, it appears from the averments of said replication that the acceptance of said telegram was a mere act of courtesy on the part of defendant and the defendant was under no obligation by in respect of said message until it was accepted by defendant at Greenville.

7th. Because, it clearly appears that the operator who accepted the message at Greenville over the telephone from Fort Deposit was the agent of the plaintiff.

RUSHTON & CRENSHAW,
Attorneys for Defendant.

Filed October 5th, 1920.

---

## AMENDED COMPLAINT.

Comes the plaintiff and by leave of the Court first obtained amends his complaint by adding thereto the following counts:

2. Plaintiff hereby refers to and adopts all of the first count of the complaint without transcribing the same down to the words, "wherefore plaintiff avers", where they are set out in the first count and adding immediately after that part of the first count hereby adopted the following:

Plaintiff avers that said alteration and change in said message above named so as to read fifteen cents instead of fifty cents per pound for the pecans sold and delivered to Lewis and the misconduct herein complained of were all willfully brought about and willfully done by the servants and agents of the defendant, all to the loss and damage to the plaintiff in the sum above claimed. Wherefore plaintiff sues.

3. Plaintiff hereby refers to and adopts all of the first count of the complaint without transcribing the same down to the words, "wherefore plaintiff avers", where they are set out in the first count and adding immediately after that part of the first count hereby adopted the following:

And plaintiff avers that said alteration and change in said message above named so as to read fifteen cents instead of fifty cents per pound for the pecans sold and delivered to Lewis and the misconduct herein complained of were by and through the gross negligence of defendant's servants and agents.

4. Plaintiff hereby refers to and adopts all of the first count of the complaint without transcribing the same down to the words, "wherefore plaintiff avers", where they are set out in the first count and adding immediately after that part of the first count hereby adopted the following:

Wherefore plaintiff avers that by reason of the alteration and change in said message above named so as to read fifteen cents instead of fifty cents per pound for the pecans sold and delivered to Lewis, all of which was done through the gross negligence of defendant's servants and agents, plaintiff has sustained loss and damage in the sum above claimed, together with the interest thereon and loss

and damages for the sending of said telegrams, with interest thereon.

POWELL & HAMILTON,
Plaintiff's Attorneys.

Filed September 27th, 1922.

## DEFENDANT'S DEMURRERS.

Now comes the defendant and demurs to count two of the complaint added by way of amendment on the following grounds:

1. Said count does not charge the breach of any duty owing to the plaintiff by the defendant.

2. It is not avered in said count that plaintiff's damages was the proximate result of any breach of duty on the part of the defendant.

3. Said count is inconsistent and repugnant in that in one part thereof, it is alleged that the defendant negligently breached its duty to the plaintiff and in another part thereof, it is alleged that plaintiff's damages were caused by the willful acts of the defendant or its servants or agents.

4. Because it is not averred that the acts and things complained of on the part of the defendant's servants or agents were done by them within the line or scope of their employment.

5. Because it is not averred that the defendant authorized or ratified the willful acts of its servants or agents complained of in said count.

6. Because it is not averred in said count that the servants or agents of the defendant willfully caused the damage or injury to the plaintiff complained of.

7. Because it is not averred in said count that the servants or agents of the defendant willfully inflicted any injury upon the plaintiff.

And the defendant demurs to count three of the complaint and as grounds of demurrer, thereto, assigns each and every ground of demurrer above assigned to count two, and the following additional grounds:

8. Said count is inconsistent and repugnant in that one part thereof, it is alleged that plaintiff's damages were caused by simple negligence on the part of the defendant or its servants or agents, and in another part thereof, it is alleged that plaintiff's damages were caused by gross negligence on the part of its servants or agents.

9. Because it is not averred that the defendant's servants or agents were acting within the line or scope of their employment at the time of the acts and things therein complained of.

10. Because it is not averred in said count that the defendant's servants or agents were conscious that their conduct was likely to or probably would result in injury to the plaintiff.

11. Because no facts are averred in said count showing, or tending to show how or wherein the defendant's servants or agents were guilty of gross negligence.

12. Because the allegation in said count that the defendant's servants or agents were guilty of gross negligence states a mere conclusion of the pleader and no facts are averred on which such conclusion is based.

And the defendant demurs to the fourth count of the complaint and as grounds of demurrer thereto, assigns sep-

arately and severally, each and every ground of demurrer above assigned to counts two and three, separately and severally.

RUSHTON, CRENSHAW & RUSHTON,
Attorneys for Defendant.

Filed April 3rd, 1923.
Re-filed April 3rd, 1923.

## AMENDED COMPLAINT.

Comes the plaintiff and by leave of the Court first obtained amends his complaint by adding thereto the following counts:

5. Plaintiff hereby refers to and adopts all the first count of the complaint without transcribing the same, down to the words, "wherefore plaintiff avers" where they are set out in the first count and adding immediately after that part of the first count hereby adopted, the following:

Plaintiff avers that said alteration and change in said message above named so as to read fifteen cents instead of fifty cents per pound for the pecans sold and delivered to Lewis and the negligence and misconduct herein complained of were all willfully brought about and willfully done by the servants and agents of the defendant, who at the time were acting within the scope of their authority, all to the loss and damage of the plaintiff in the sum above claimed. Wherefore plaintiff sues.

6. Plaintiff hereby refers to and adopts all of the first count of the complaint without transcribing the same, down to the words, "Wherefore plaintiff sues", where they are set out in the first count and adding immediately after that part of the first count hereby adopted the following:

And plaintiff avers that said alteration and change in said message above named so as to read fifteen cents instead of fifty cents per pound for the pecans sold and delivered to Lewis and the misconduct herein complained of were by and through the negligence of defendant's servants and agents, acting within the scope of their authority, and that such negligence herein complained of on the part of said agents and servants of defendant was gross.

7. Plaintiff herby refers to and adopts all the first count of the complaint without transcribing the same, down to the words, "wherefore plaintiff avers", where they are set out in the first count, and adding immediately after that part of the first count hereby adopted, the following:

Wherefore plaintiff avers that by reason of the alteration and change in said message above named so as to read fifteen cents instead of fifty cents per pound for the pecans sold and delivered to Lewis, plaintiff has sustained loss and damage in the sum above claimed, that said alteration and change in said message and the delivery of the same so as to read fifteen cents instead of fifty cents per pound and the negligence herein complained of was gross negligence on the part of the servants and agents of the defendant, who at the time were acting within the scope of their authority. Wherefore plaintiff sues.

POWELL & HAMILTON,
Attorneys for Plaintiff.

Filed April 3rd, 1923.

---

## DEFENDANT'S FURTHER PLEA.

Now comes the defendant, and for answer to the second, third, fourth and fifth counts of the complaint separately and severally files each and every plea heretofore filed to

Count One of the complaint and the following additonal plea:

6. For further plea this defendant says that the telegraphic message described in the complaint and each count thereof, and on which this action is based, was an interstate message to be sent from a point in the State of Alabama, to-wit: Fort Deposit, Alabama, to a point in the State of Louisiana, to-wit: New Orleans, Louisiana, and was as such interstate commerce; that according to defendant's established rules, regulations and tariffs, as the same were on file with the Interstate Commerce Commission on December Sixteenth, Nineteen Hundred and Nineteen, and have ever since been, and are, still maintained, the defendant was not liable for damages for any mistakes or delays in transmission or delivery or for nondelivery of this message whether caused by the negligence of its servants or otherwise beyond the sum of Fifty Dollars at which amount telegraphic messages were valued unless a greater value was stated in writing upon the message at the time the same was offered to the company for transmission and an additional sum paid or agreed to be paid, based on such value, equally to one-tenth of one percent thereof. That the message sued upon in this action was not valued at any greater value than Fifty Dollars and no additional sum was paid or agreed to be paid thereon based on such values.

Defendant further avers by the Act of Congress approved June eighteenth, Nineteen Hundred and Ten (36 Stat. L. 539), the Congress of the United States entered and assumed charge of the regulating of the field of interstate regulation or interference, and undertook and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in

particular conferred upon the Interstate Commerce Commission power to approve, alter or acquiesce in existing ratss and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

Wherefore defendant says it is only liable to the plaintiff in this action in the sum of Fifty Dollars together with interest thereon from the date of transmission of said message.

RUSHTON & CRENSHAW,
Attorneys for Defendant.

Filed April 3rd, 1923.

---

## PLAINTIFF FURTHER DEMURS

Comes the plaintiff and demurs separately and severally to each of the defendant's pleas 3, 4, 5 and 6 to counts 5, 6 and 7 of the complaint as amended, and for grounds of demurrer assigns separately and severally to each of said pleas to each of said counts the following:

First: Said pleas are no answer to said counts or either of them.

Second: The causes set up in counts 5, 6 and 7 of the complaint as amended claim damages arising out of the willful and gross negligence of the defendant's servants or agents, and the matters set up in said pleas are no answer to said claim.

Third: The matters set up in said pleas do not deny the willful or gross negligence complained of in said counts 5, 6 and 7, nor do the matters set up in said pleas confess or avoid the acts of willful and gross negligence complained of in said counts.

Fourth: The matters set up in said pleas are no answer to the plaintiff's claim for damages for the willful and gross negligence complained of in said counts.

POWELL & HAMILTON,
Attorneys for Plaintiff.

Filed April 3rd, 1923.

JUDGMENT ON PLEADINGS, ETC.

April 3rd, 1923. Came the parties and defendant's demurrer to counts 2, 3 and 4 of the complaint as amended, being submitted to the Court, it is considered and adjudged by the Court that said demurrer be, and is sustained.

Plaintiff has leave to amend the complaint by adding counts 5, 6 and 7, which is done. Thereupon, defendant refiled its demurrer to counts 5, 6 and 7 of the amended complaint, which had heretofore been filed to counts 2, 3 and 4 of the amended complaint. The demurrer to counts 5, 6 and 7 of the complaint as amended being submitted to the Court, it is considered and adjudged by the Court that said demurrer be, and the same is overruled. Thereupon, defendant refiled its pleas 1, 2, 3, 4 and 5, and also an additional plea 6 to the complaint as amended. Thereupon the plaintiff demurs to said pleas 3, 4, 5 and 6 as interposed to counts 1, 5, 6 and 7 of the complaint as amended, which said demurrer being submitted to the Court, it is considered and adjudged by the Court that the demurrer to pleas 3, 4, 5 and 6 to counts 5, 6 and 7 of the complaint as amended be sustained, and that the demurrer to said pleas to count one of the complaint as amended be, and the same is overruled.

And issue being joined on the pleadings thereupon came a jury of good and lawful men, to-wit: J. H. Griffin and

eleven others who, being duly and legally empaneled, sworn and charged, upon their oath, do say: "We, the jury, find for the plaintiff and assess his damages at One Dollar."

It is therefore considered and adjudged by the Court that the plaintiff have and recover of the defendant said sum of One Dollar damages as assessed by the jury, for which let execution issue.

It is further considered and adjudged by the Court that the defendant have and recover of the plaintiff the costs of this suit, except one dollar, for which let execution issue.

---

## AMENDED PLEAS.

Now comes the defendant, by its attorneys, and for answer to the complaint herein and each count thereof, separately and severally, pleads:

1. The General Issue.

2. For a separate and partial defense this defendant says: That the telegraphic message described in the complaint and on which this action is based was an interstate message, to be sent from a point in the State of Alabama, to-wit: Fort Deposit, Alabama, to a point in the State of Louisiana, to-wit: New Orleans, Louisiana, and was as such interstate commerce; that at the time said telegraphic message was received by it for transmission it had on file with the Interstate Commerce Commission its rules, regulations and tariffs governing the receipt, transmission and delivery of messages; that one of defendant's said rules and regulations so on file with the Interstate Commerce Commission as aforesaid was the following:

"To guard against mistakes or delays the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this one-half the unrepeated message rate is charged in additon," and that unless otherwise indicated all messages were sent as unrepeated messages and paid for as such; that in consideration of such classification and difference in rates it was agreed between the sender of the message and the telegraph company that the defendant should not be liable for any mistakes or delays in the transmission or delivery or for non-delivery of an unrepeated message beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message beyond fifty times the sum received for sending the same unless specially valued; that the message on which this suit is based was sent as an unrepeated message, and defendant was not directed or requested to repeat the same, and that defendant received in exchange for its obligation in respect to said message the sum of, to-wit: One Dollar, which was defendant's ordinary and reasonable charge for the transmission and delivery of such message without repetition from the point of origin to the point of destination, including its delivery at destination.

Defendant avers that under the power conferred upon it by Article I, Section 8, Subdivision 3, of the Constitution of the United States the Congress of the United States by the provision of the Act of Congress To Regulate Commerce, as amended June 18, 1910 (36 Stats. at L. 539) entered and assumed charge of the regulating of the field of interstate communication by telegraph and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities,

classifications and practices of telegraph companies engaged in interstate commerce with reference to such commerce, and in particular conferred upon the Interstate Commerce Commission power to approve, alter and acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains; that the Interstate Commerce Commission by its decision rendered on May 17, 1917, in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company against the Western Union Telegraph Company (44 I. C. C. 670) recognized the validity of said provision limiting liability in the case of mistakes or delays in the transmission and delivery of an unrepeated message to the amount received for sending the same.

Wherefore, defendant says that the stipulation in the contract subject to which, and subject to which only, the telegram on which this suit is based was accepted, to the effect that the defendant's liability should not in any event exceed the amount paid for its transmission, to-wit: One Dollar, was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of Alabama or any other State, and that the defendant ought not to be liable in any event in this action beyond the sum of to-wit: One Dollar, the amount received for sending said telegram, with interest thereon from December 16, 1919.

3. For a further separate and partial defense this defendant says: That the telegraphic message described in the complaint and on which this action is based was an interstate message to be sent from a point in the State of Alabama, to-wit: Fort Deposit, Alabama, to a point in the State of Louisiana, to-wit: New Orleans, Louisiana, and was as such interstate commerce; that at the time such telegraphic message was received by it for transmission it had on file with the Interstate Commerce Commission its

rules, regulations and tariffs governing the receipt, transmission and delivery of messages; that according to these rules, regulations and tariffs the defendant was not liable for damages for any mistakes or delays in the transmission or delivery of messages, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount telegraphic messages were valued unless specially valued at a greater sum at the time the message was offered to the Company for transmission, and an additonal sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof. That the message upon which this action is based was not valued at any greater sum than fifty dollars, and no additonal sum was paid or agreed to be paid thereon based on such values.

Defendant avers that under the power conferred upon it by Article I, Section 8, Subdivision 3, of the Constitution of the United States the Congress of the United States, by the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Stats. at L. 539) entered and assumed charge of the regulating of the field of interstate communication by telegraph and thereby removed and exempted such interstate communication by telegraph from the field of state regulation and interference, and undertook and did confer upon the Interstate Commerce Commission full power over the rates, charges, classifications, facilities and practices of telegraph companies engaged in interstate commerce with reference to such commerce, and in particular conferred upon the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains; that the Interstate Commerce Commission by its decision rendered on May 17, 1917, in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), recognized the validity of such

provision limiting the liability of the defendant for damages for mistakes or delays in the transmission or delivery or for non-delivery of messages, whether caused by the negligence of its servants or otherwise, to the sum of fifty dollars, unless a greater value was stated at the time the same was offered to the Company for transmission and an additonal sum paid or agreed to be paid based on such value.

Wherefore, defendant says that the stipulation in the contract subject to which and subject to which only the telegram on which this suit is based was accepted to the effect that the Company should not be liable for damages for any mistakes or delays in the transmission or delivery or for non-delivery of said message, whether caused by the negligence of its servants or otherwise, beyond said sum of fifty dollars was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of Alabama or any other State, and that the defendant ought not to be liable in any event in this action beyond said sum of fifty dollars, with interest thereon from, to-wit: the 16th day of December, 1919.

4. For a further separate and partial defense this defendant says: That the telegraphic message described in the complaint and on which this action is based was an interstate message, to be sent from a point in the State of Alabama, to-wit: Fort Deposit, Alabama, to a point in the State of Louisiana, to-wit: New Orleans, Louisiana, and was as such interstate commerce; that at the time said telegraphic message was received by it for transmission it had on file with the Interstate Commerce Commission its rules, regulations and tariffs governing the receipt, transmission and delivery of messages; that one of defendant's said rules and regulations so on file with the Interstate Commerce Commission as aforesaid was the following:

"To guard against mistakes or delays the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this one-half the unrepeated message rate is charged in additon," and that unless otherwise indicated all messages were sent as unrepeated messages and paid for as such; that in consideration of such classification and difference in rates it was agreed between the sender of the message and the telegraph company that the defendant should not be liable for any mistakes or delays in the transmission or delivery or for non-delivery of an unrepeated message beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message beyond fifty times the sum received for sending the same unless specially valued; that the message on which this suit is based was sent as an unrepeated message, and defendant was not directed or requested to repeat the same, and that defendant received in exchange for its obligation in respect to said message the sum of, to-wit: One Dollar, which was defendant's ordinary and reasonable charge for the transmission and delivery of such message without repetition from the point of origin to the point of destination, including its delivery at destination.

Defendant avers that under the power conferred upon it by Article I, Section 8, Subdivision 3, of the Constitution of the United States the Congress of the United States by the provisions of the Act of Congress to regulate commerce, as amended June 18, 1910 (36 Stats. at L. 539) entered and assumed charge of the regulating of the field of interstate communication by telegraph and thereby removed and exempted such interstate communication by telegraph from the field of state regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, fa-

cilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such commerce, and in particular conferred upon the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains; that the Interstate Commerce Commission by its decision rendered on May 17, 1917, in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670) recognized the validity of said provision limiting liability in the case of mistakes or delays in the transmission and delivery of an unrepeated message to the amount received for sending the same.

Wherefore, defendant says that the plaintiff, having paid the lower rate charged for the transmission and delivery of an unrepeated message from Fort Deposit, Ala., to New Orleans, La., as a part of which rate the liability of the telegraph company for mistakes or delays was limited to the amount received for sending the message, is now estopped to claim that his damages for the mistake complained of exceeded said amount so paid by plaintiff for sending said message, to-wit: One Dollar, with interest thereon.

5. For a further separate and partial defense this defendant says: That the telegraphic message described in the complaint and on which this action is based was an interstate message to be sent from a point in the State of Alabama, to-wit: Fort Deposit, Alabama, to a point in the State of Louisiana, to-wit: New Orleans, Louisiana, and was as such interstate commerce; that at the time such telegraphic message was received by it for transmission it had on file with the Interstate Commerce Commission its rules, regulations and tariffs governing the receipt, transmission and delivery of messages; that according to these

rules, regulations and tariffs the defendant was not liable for damages for any mistakes or delays in the transmission or delivery of messages or the non-delivery of messages, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount telegraphic messages were valued unless specially valued at a greater sum at the time the message was offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof. That the message upon which this action is based was not valued at any greater sum than fifty dollars, and no additonal sum was paid or agreed to be paid thereon based on such value.

Defendant avers that under the power conferred upon it by Article I, Section 8, Subdivision 3, of the Constitution of the United States the Congress of the United States, by the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Stats. at L. 539) entered and assumed charge of the regulating of the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of state regulation and interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, classifications, facilities and practices of telegraph companies engaged in interstate commerce with reference to such commerce, and in particular conferred upon the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains; that the Interstate Commerce Commission by its decision rendered on May 17, 1917, in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), recognized the validity of such

provision limiting the liability of the defendant for damages for mistakes or delays in the transmission or delivery or for non-delivery of messages, whether caused by the negligence of its servants or otherwise, to the sum of fifty dollars, unless a greater value was stated at the time the same was offered to the Company for transmission and an additional sum paid or agreed to be paid based on such value.

Wherefore, defendant says that the plaintiff having paid the rate charged for the transmission and delivery of a message from Fort Deposit, Alabama, to New Orleans, Louisiana, based upon a valuation of fifty dollars for said message, as a part of which rate the liability of the telegraph company for mistakes or delays was limited to said sum of fifty dollars, is now estopped to claim that his damages for the mistake complained of exceeded said sum of fifty dollars with interest thereon.

FRANCIS R. STARK,
RUSHTON, CRENSHAW & RUSHTON,
Attorneys for Defendant.

Filed September 29th, 1925.

---

## PLAINTIFF'S DEMURRERS TO PLEAS 2, 3, 4 AND 5, FILED SEPT 29TH, 1925.

Comes the plaintiff and demurs separately and severally to each of the defendant's pleas numbered 2, 3, 4 and 5, filed September 29th, 1925, to count five of the complaint as amended, and for grounds of demurrer, assigns the following:

1. Said pleas are no answer to said count five.

2. The cause of action set up in count five of the complaint as amended claims damages arising out of the willful misconduct of the servants and agents of the defendant and the matters set up in said pleas are no answer to the cause of action set forth in said count five.

Plaintiff demurs separately and severally to each of the defendant's pleas 2, 3, 4 and 5 filed September 29th, 1925, to counts six and seven of the complaint as amended and for grounds of demurrer assigns separately and severally to each of said pleas to each of said counts, the following:

1. Said pleas are no answer to said counts six and seven or either of them.

2. The causes of action set up in counts six and seven of the complaint as amended claim damages arising out of the gross negligence of the defendant's servants and agents and the matters set up in said pleas are no answer to said claim.

3. The matters set up in said pleas do not deny the gross negligence complained of in said counts six and seven nor do the matters set up in said pleas confess or avoid the acts of gross negligence complained of in said counts.

4. The matters set up in said pleas are no answer to plaintiff's claim for damages for the gross negligence complained of in said counts.

POWELL & HAMILTON,
Attorneys for Plaintiff.

Filed September 29th, 1925.

## ORAL CHARGE OF COURT.

Delivered September 30th, 1925.
Gentlemen of the Jury:—

The plaintiff in this case, C. H. Priester, brings suit against the Western Union Telegraph Company and claims $353.10 as damages which he alleges is due to him by the defendant for that on December 16th, 1919, the plaintiff delivered to the defendant's agents at Ft. Deposit and Greenville for transmission to one Lewis in New Orleans a certain telegram which is described in the complaint which reads—I offer you a thousand or fifteen hundred pounds of Frotchers pecans at 50 cents f.o.b. Ft. Deposit. Answer. C. H. Priester, and he alleges that after the telegram was delivered by him to the defendant for transmission the defendant in the transmission of that telegram made an error or mistake in its transmission so that when it reached Mr. Lewis, to whom it was addressed, it read,—Offer you thousand or fifteen hundred pounds Frotchers pecans at 15 cents a pound f.o.b. Ft. Deposit. Answer. C. H. Priester; and he alleges that after this telegram was sent that he shipped the pecans on receipt of a telegram from Mr. Lewis accepting his offer, that he shipped him a thousand pounds of pecans and that he paid him only fifteen cents a pound for them and that he was damaged in consequence of the plaintiff's negligence in the transmission of the telegram the amount of the difference between fifty cents and fifteen cents per pound for the pecans.

The plaintiff contends that the reasonable cash market value of the pecans at that time at Ft. Deposit free on board of the car was fifty cents per pound.

The plaintiff contends that the mistake in the transmission of the message by the defendant was due to the negli-

gence of its servants and agents in the performance of their duty.

In the second place the plaintiff alleges that the negligence of the defendant in the transmission of this telegram by its servants and agents was gross negligence. In two counts of the complaint he alleges practically the same thing that the damages which he contends for was by reason of the sending of the message, sending the telegram, and that it was gross negligence of the defendant, its agents and servants, in and about the transmission of the telegram.

Now the defendant in answer to the complaint denies the allegations contained in it,—that is its plea of general issue.

In the second place the defendant insists in answer to the first count of the complaint that this message which was delivered to it by the plaintiff for transmission of it to Mr. Lewis at New Orleans was an interstate message, that is to say it was sent from a point in Alabama, to a point in Louisiana, New Orleans. That it was an unrepeated message and that the regulations of file with the defendant, the Western Union Telegraph Company by the Interstate Commerce Commission at Washington provides that wherever an error or a mistake occurs in the sending of an interstate message, an unrepeated message, the liability of the defendant for any damage resulting from the error in transmission of the message is limited to the amount that was paid by the plaintiff to the defendant for the sending of the message.

Now, the burden of proof in the first place is on the plaintiff to reasonably satisfy you that he delivered to the defendant or to the defendant's servant or agent a telegram to be transmitted to J. K. Lewis Produce Company at New Orleans, La., and that he paid the defendant the toll for the transmission of that message.

Then, in the next place the burden of proof is on the plaintiff to reasonably satisfy you that the message was incorrectly transmitted to Mr. Lewis to whom it was sent.

Now if you find that to be true, that he did deliver the message to the defendant and that the defendant undertook to send it, and that there was a mistake in the message, and that the message read fifteen cents instead of fifty cents per pound as is contended, then the next question you would determine would be whether or not the mistake was committed by the defendant, its agents or servants. If it was, under what circumstances was the mistake committed? Now, if you find those facts to be true, that an error was made—

Mr. Powell: In order to get the matter simplified we withdraw the first count of the complaint and rely on the last two counts of the complaint and let remain as far as applicable the last two counts.

The Court: So it becomes a question for you to say whether or not the defendant's servants or agents in the transmission of the telegram were guilty of gross negligence in and about its transmission as alleged in the complaint. If it was the plaintiff would be entitled to recover. If it was not the plaintiff would not be entitled to recover. That is all there is in the case.

The Supreme Court in defining negligence says—Negligence is a failure to bestow the care and skill which the situation demands. In other words it was the duty of the defendant in the transmission of this telegram to handle it with the care and with the skill the situation demanded; it was the duty of the defendant to provide itself and its servants and agents with proper instruments for the transmission of the message and with skillful operators for the operation of those instruments. So that the question you

are to determine is whether or not under the conditions and circumstances under which this message was deliverd and transmitted, the defendant through its agents and servants did bestow the care and skill which the situation demanded they should bestow. If they did and there was a mistake in the transmission of the message the plaintiff could not recover, but if they did not then the plaintiff would be entitled to recover the damages which the testimony, after you have considered it all, shows the plaintiff suffered by reason of the error or mistake of the defendant. That is all there is in the case.

You take the testimony of all the witnesses both for the plaintiff and for the defendant, the testimony that was delivered in your presence and the other testimony that was read to you and consider it all and let your verdict speak what you believe to be the truth of it.

If you find for the plaintiff then you would assess the amount of the plaintiff's damages as shown by the testimony in the case, calculate the interest on it from December 16, 1919, to this date at 8% per annum, add the interest to the principal and that would be the plaintiff's damage, and in that event you would say by your verdict, We, the jury, find for the plaintiff, and assess the plaintiff's damage—so many dollars, whatever sum you find.

If you find for the defendant your verdict would be, We, the jury, find for the defendant.

Whatever form your verdict takes, write it on the back of the complaint and one of you gentlemen sign your name to it and write the word, "Foreman," after it.

Mr. Crenshaw: We want to except to that portion of the oral charge where you undertook to define negligence and that if the defendant did not exercise the degree of

care which the situation demanded the plaintiff would be entitled to recover. And I will want to amend my grounds of exceptions.

The Court: That is all right.

---

REFUSED CHARGES

3. If you believe the evidence in this case you can not find a verdict for the plaintiff under the sixth count of the complaint.

Refused—Gamble, Judge.

4. If you believe the evidence in this case you can not find a verdict for the plaintiff under the seventh count of the complaint.

Refused—Gamble, Judge.

6. If you believe the evidence in this case you can not return a verdict for the plaintiff under the sixth count of the complaint for more than the amount paid for the message, together with interest thereon.

Refused—Gamble, Judge.

7. If you believe the evidence in this case you can not return a verdict for the plaintiff under the seventh count of the complaint for more than the amount paid for the message, together with interest thereon.

Refused—Gamble, Judge.

8. I charge you that under the evidence in this case you can not find that the defendant or its servants, agents or employees were guilty of gross negligence in and about the transmission or delivery of the telegraph message described in the complaint.

Refused—Gamble, Judge.

9. I charge you that under the evidence in this case you can not find that the defendant or its servants, agents or employees were guilty of wilful misconduct in and about the transmission or delivery of the telegraph message described in the complaint.

Refused—Gamble, Judge.

10. I charge you that a mere error made in the transmission of a telegraphic message in and of itself is not sufficient to authorize you to find that the defendant or its servants, agents or employees were guilty of gross negligence in and about the transmission or delivery of the telegraphic message described in the complaint.

Refused—Gamble, Judge.

11. I charge you that the plaintiff Mr. Priester having sent the message described in the complaint as an unrepeated message and the liability for errors on the part of the defendant in and about the transmission or delivery of unrepeated messages being limited by law and the rules and regulations of the telegraph company on file with the Interstate Commerce Commission to the amount paid for the transmission and delivery of such message, the plaintiff is estopped to claim that his damages on account of the error made in the transmission of said message are greater than the amount paid for said message, together with interest thereon.

Refused—Gamble, Judge.

12. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), the liability of the telegraph company for the error made in the trans-

mission of the message described in the complaint is limited to the amount paid for its transmission and delivery, with interest thereon, regardless of whether or not you believe from the evidence that such mistake was due to simple negligence or gross negligence on the part of the defendant telegraph company, its servants, agents or employees.

Refused—Gamble, Judge.

13. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), the liability of the telegraph company for the error made in the transmission of the message described in the complaint is limited to the amount paid for its transmission and delivery, with interest thereon, regardless of whether or not you believe from the evidence that such mistake was due to simple negligence or gross negligence on the part of the defendant telegraph company, its servants, agents or employees.

Refused—Gamble, Judge.

14. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph

Company, (44 I. C. C. 670), the liability of the defendant telegraph company was limited to the amount paid by the plaintiff in this case for the transmission and delivery of the message with interest thereon.

Refused—Gamble, Judge.

15. If you believe the evidence in this case you can not find a verdict for the plaintiff for more than the sum of fifty dollars, together with interest thereon.

Refused—Gamble, Judge.

16. I charge you as a matter of law that the telegraph message described in the complaint was valued by the plaintiff at the sum of fifty dollars at the time the same was offered by him to the defendant for transmission, and that the plaintiff not having valued said message at a higher sum than fifty dollars at said time and paid the higher rate required for the transmission of a message valued at more than fifty dollars, he is now estopped to claim that his damages in this case are more than said sum of fifty dollars, with interest thereon.

Refused—Gamble, Judge.

17. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), the liability of the defendant telegraph company was limited to the sum of fifty dollars with interest thereon, at which said sum said message was valued at the time it was offered to the defendant for transmis-

sion, regardless of whether or not the error made in the transmission of said message was due to simple negligence or gross negligence on the part of the defendant, its servants, agents or employees.

Refused—Gamble, Judge.

18. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the proviisons of Article I, section 8, subdivision 3. of the Constitution of the United States, and the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), the liability of the defendant telegraph company was limited to the sum of fifty dollars with interest thereon, at which said sum said message was valued at the time it was offered to the defendant for transmission, regardless of whether or not the error made in the transmission of said message was due to simple negligence or gross negligence on the part of the defendant, its servants, agents or employees.

Refused—Gamble, Judge.

19. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), the liability of the defendant telegraph company to the plaintiff in this case for the error made in the transmission of said message is limited to the sum of fifty dollars with interest thereon.

Refused—Gamble, Judge.

20. Under the undisputed evidence in this case the jury can not render a verdict for plaintiff for more than fifty dollars with interest thereon at the rate of eight per cent per annum from the time of the accrual of plaintiffs cause of action to the date of trial.

Refused—Gamble, Judge.

21. The plaintiff can not recover more than the amount paid for transmission of the telegram with interest thereon, unless the jury should find from all the evidence in the case that some operator of the company either wilfully or with such reckless and wanton disregard of the consequences as to amount to the same thing changed or caused to be changed the word fifty to fifteen. If the change from fifty to fifteen resulted from mere inadvertence the plaintiff under the law can only recover the amount paid for the transmission with interest thereon.

Refused—Gamble, Judge.

22. If the jury find from the evidence that the change of the word fifty to fifteen was a mere mistake or error such as may happen at times to skilled men in the exercise of that degree of diligence and attention which careful and prudent men apply to affairs of importance the plaintiff can not recover.

Refused—Gamble, Judge.

---

JUDGMENT

September 29th, 1925, Came the parties and by leave of the Court first obtained, the defendant withdraws all pleas heretofore filed in this cause, and files in lieu thereof, on this day pleas number 1 to 5 both inclusive. Thereupon the plaintiff demurs to defendant's pleas 2, 3, 4 and 5 as interposed to counts 5, 6 and 7 of the complaint, which demurrers being submitted to the Court, and being argued by counsel and being understood by the Court, it is considered

and adjudged by the Court that said demurrers to pleas 2, 3, 4 and 5 to counts 5, 6 and 7 of the complaint be, and the same are sustained.

Thereupon by leave of the Court first obtained plaintiff amends his complaint by striking therefrom count 5 and also by striking count one of the complaint, except in so far as the averments in count one are referred to and made parts of counts 6 and 7 of the complaint, which said parts of count one are retained as parts of counts 6 and 7. It is, therefore, considered and adjudged by the Court that said amendments offered by the plaintiff be, and the same are allowed, and said counts 5 and 1 are stricken, but the averments in count one of the complaint in so far as they are referred to and made parts of counts 6 and 7 of the complaint are retained and not stricken.

Issue being joined on counts 6 and 7 of the complaint as amended and the pleas of the defendant thereto, thereupon came a jury of good and lawful men, to-wit: E. A. Barrow and eleven others, who being duly and legally empaneled, sworn and charged upon their oaths do say: "We, the jury, find for the plaintiff and assess his damages at Five Hundred Fourteen and 07|100 ($514.07) Dollars.

It is, therefore, considered and adjudged by the Court that the plaintiff have and recover of the defendant the sum of Five Hundred and Fourteen and 07|100 ($514.07) Dollars, the damages assessed by the jury and also the costs of this suit, for which let execution issue.

---

## MOTION FOR NEW TRIAL.

Now comes the defendant, the Western Union Telegraph Company, by its attorneys, and moves the Court to set aside

the verdict of the jury rendered in said cause on the 29th day of September, 1925, and the judgment entered on said verdict, and to grant to defendant a new trial on the following grounds:

1. Because said verdict is contrary to the evidence.

2. Because said verdict is contrary to the great weight of the evidence.

3. Because said verdict is contrary to law.

4. Because under the great weight of the evidence the jury was unauthorized to find that the defendant, or its servants, agents or employees, were guilty of gross negligence or wilful misconduct in and about the transmission or delivery of the telegraphic message described in the complaint.

5. Because the Court erred in failing to give to the jury separately and severally written charges requested by the defendant numbers.

6. Because under Article I, section 8, subdivision 3, of the Constitution of the United States, the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539) and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670) the liability of the defendant telegraph company to the plaintiff was limited to the amount paid for the transmission and delivery of said message with interest thereon, regardless of whether or not the error made in the transmission of said message was due to simple negligence or gross negligence on the part of the defendant, its servants, agents or employees, and the Court erred in permitting the

jury to return a verdict for the plaintiff if they believed that the error was caused by gross negligence on the part of the defendant, its servants, agents or employees.

7. Because under Article I, section 8, subdivision 3, of the Constitution of the United States, the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539) and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), the liability of the defendant telegraph company to the plaintiff was limited to the sum of fifty dollars with interest thereon, at which said sum the message described in the complaint was valued by the plaintiff at the time it was offered to the defendant for transmission, and the Court erred in permitting the jury to find a verdict for the plaintiff for more than the sum of fifty dollars with interest thereon.

RUSHTON, CRENSHAW & RUSHTON,
Attorneys for Defendant.

To C. H. Priester or Messrs.
Powell & Hamilton, his Attorneys.
Filed September 29th, 1925.

---

## JUDGMENT REFUSING MOTION FOR NEW TRIAL

October 3rd, 1925, Came the parties by their attorneys and defendant submits to the Court its motion for a new trial, which said motion is submitted upon the testimony adduced on the trial and the charges, and matters referred to in the motion and said motion being argued and in all things understood by the Court.

It is therefore considered and adjudged by the Court that said motion for a new trial be, and the same is overruled, and to this action of the Court, the defendant excepts.

## BILL OF EXCEPTIONS

BE IT REMEMBERED; That on the trial of the above entitled cause, which came on for trial before the Honorable Arthur E. Gamble, Judge of the Circuit Court of Butler County, Alabama, and a jury, on the 29th day of September, 1925, the following proceedings not otherwise appearing of record were had and orders made, to-wit:

Miss Senotie Harrison, a witness for the plaintiff, testified as follows: I live at Fort Deposit, where I am operator in charge of the Southern Bell Telephone and Telegraph Company's office. I have been operator there for four years and was in charge there on the 16th day of December 1919. There is no Western Union Telegraph Co. office at Fort Deposit. I have no idea as to how many people live there. There was no telegraph office there on December 16, 1919, never has been one there since I have been operator and is none there now. When persons living at Fort Deposit wish to send telegrams, they put in long distance calls through me over the long distance phone to the Western Union operator at Greenville, and that was the custom along in December, 1919, and prior thereto. The long distance telephone at Fort Deposit was used a great deal for that purpose. I would charge the costs of the message to the telephone over which it was sent, collect for same at the end of the month and send the proceeds to the Commercial Department of the Southern Bell Telephone Company at Montgomery. I did not know anything about what the charges were. The Western Union would give me the rate over the telephone from Greenville, and I would put it down and collect from the sender. That was the general custom

there. I remember Mr. Priester coming to me to send a message for him to a Mr. Lewis at New Orleans. He did not tell me what he wanted to send. I sent off a telephone message for him to the Western Union operator at Greenville. I wrote down the message and phoned it in. It was on the back of a letter furnished me by Mr. Priester. I wrote down and telephoned: "Offer you one thousand to fifteen hundred pounds Frotcher pecans at fifty cents F. O. B. Fort Deposit." The operator at Greenville repeated it back to me just as I read it to him. Mr. Priester paid me for the message the amount the Western Union charged for sending the message. The operator at Greenville told me the amount and I collected it from Mr. Priester.

On cross-examination the witness Senotie Harrison testified: I did not take down all messages Fort Deposit people wanted to send. Most everybody there was connected with the telephone and did their own telephoning. Mr. Priester did not and I telephoned for him.

Mr. C. H. Priester, the plaintiff, sworn as a witness in his own behalf, testified as follows: I am the plaintiff in this case, I live at Fort Deposit, Lowndes County, Alabama, and was living there in December, 1919. At that time I was engaged in farming and pecan growing, and I am still engaged in those businesses. I had pecans for sale in 1919, and had some correspondence about selling pecans with a man named J. K. Lewis at New Orleans. I remember sending a telegram over long distance from Fort Deposit to Greenville and to New Orleans. The Western Union did not have a telegraph office at Fort Deposit at that time. I sent the telegram by telephone to Greenville. I got Miss Senotie Harrison, the telephone operator at Fort Deposit at that time to phone the message down to Greenville. She had charge of long distance messages and sent telegrams from Fort Deposit over the long distance telephone. At the

time I got Miss Harrison to telephone the message to J. K. Lewis I had received a letter from him. He had written me several letters and I got one the morning I sent him the telegram. I showed Miss Harrison that letter and got her to read the contents of it.

The witness is here shown letter from J. K. Lewis addressed to witness, about which he had been asked, and identified it, and stated it was the letter which contained on the back the message which he had dictated to Miss Harrison. The writing on the back of the letter was as follows:

"I offer you 1000 or 1500 lbs. Frotcher pecans at .50c F. O. B. Ft. Deposit Answer. 12-16-19. C. H. Priester."

The plaintiff here introduced the said message in evidence.

The witness continued: I dictated that message to Miss Harrison. That is the correct message and the one I wanted her to send to J. K. Lewis Wholesale Produce Company, 411 Poydras St., New Orleans, La. I heard her phone it. "F. O. B. Ft. Deposit" means that Mr. Lewis, the man I was shipping to was to pay the transportation on the merchandise, and I was to deliver it on the cars at Fort Deposit. I was not to charge anything for putting them on the car. F. O. B. means free on board of the cars at Fort Deposit. I paid Miss Harrison for the message.

It was here agreed that the price paid for the transmission of the message was eighty cents.

The witness testified: I got a reply to the telegram I sent Mr. Lewis.

The witness here identifies the message which he received from Lewis, which was offered in evidence by the plaintiff, and which read as follows:

"Western Union Telegram YD New Orleans, La. 405P Dec. 16, 1919. C. H. Priester, Ft. Deposit, Ala. Will take fifteen hundred pounds pecans offered today or tomorrows Expense Shipment. J. K. Lewis 613R"

Continuing, the witness testified: My recollection is I got the above message the next morning. It was sent out to me through the mail. After I got this telegram from Mr. Lewis stating he would take fifteen hundred pounds of pecans I shipped him 1006 pounds on the strength of the telegram. I delivered the pecans on board of the cars at Fort Deposit without making any charge for it.

The plaintiff here offered in evidence the message which was received by J. K. Lewis, and which message was admitted to be the original message delivered by the defendant to Lewis. Said message is in words and figures as follows:

"Western Union Telegram Ft. Deposit, Ala. 11:38 AM. Dec. 16, 1919, To J. K. Lewis, Street and No. N. O. La. Place. Offer you thousand or Fifteen Hundred Pounds Frothiers at Fifteen Cents FOB Deposit. Answer C. H. Priester, 1:33 PM."

Continuing the witness testified as follows: At the time I got the telegram from Mr. Lewis accepting my offer I did not know that the one I sent him had been changed from fifty cents per pound to fifteen cents per pound. When I got the reply I understood that I was selling him pecans at fifty cents per pound. I knew nothing about the change that had been made after the delivery of the message pricing the pecans at fifty cents. I filled the order with 1006 pounds of pecans and shipped them with the understanding that I was going to get fifty cents per pound for them. At the time I shipped them I did not know that there had been any change made in the telegram I had sent. I found out about the change made in the telegram about the 23rd day of January, 1920. I got an accounts

sales from Mr. Lewis for those pecans with a check for $150.90. When I got the check and the account sales I sent them back to Mr. Lewis and wrote him that was not the agreement, and that he was to settle with me according to our agreement. I told him the price was fifty cents per pound F. O. B. Fort Deposit. In a few days I got a reply from him with the check and also with the telegram which I had sent him, reading fifteen cents per pound. That was the same telegram which has been read to the jury. I made the shipment of pecans to Mr. Lewis, I think, on the 17th of December. I got the letter and the check from Lewis in the January following.

The witness was here shown a letter from J. K. Lewis to him, dated December 29th, 1919, and also an invoice or account sales bearing the same date, and identified them as the ones received by him from J. K. Lewis. Said letter and invoice were offered in evidence and were in words and figures as follows:

"J. K. Lewis, 411 Poydras Street, New Orleans, La., December 29, 1919, C. H. Priester, Fort Deposit, Ala.

"Dear Sir:

"Enclosed please find check for shipment of pecans. Hope to hear from you again whenever you have anything to sell and thanking you, I am

Sincerely yours,

JKL|MG J. K. Lewis."

"J. K. Lewis, 411 Poydras Street, New Orleans, La. December 29, 1919.

| | | |
|---|---|---|
| "Settlement 12 sacks pecans | | |
| "12 sacks pecans 1006 lb. @ 15c | | $150.90 |
| "Check inclosed | $150.90 | |
| | $150.90 | $150.90" |

The witness continued: Along with the invoice or account sales was a check for $150.90, which I sent back to Mr. Lewis. Mr. Lewis then returned the check to me with the telegram which he had received from me showing a change in the message from fifty cents to fifteen cents. This change was made without my knowledge or consent, and I knew nothing about it. At the time I made the offer to Mr. Lewis and at the time I got the telegram accepting my offer the reasonable market value of those pecans at Fort Deposit was fifty cents per pound, and they were reasonably worth that much F. O. B. cars at Fort Deposit. I never did receive anything on those pecans except the $150.90.

On cross-examination the witness testified: I received a letter from Mr. Lewis dated November 3, 1919, and the message which I sent to Mr. Lewis was written down by Miss Harrison on the back of that letter.

The plaintiff identified the letter from Lewis to him on November 3, 1919, which was introduced in evidence by defendant and which was in words and figures as follows:

New Orleans,, La., Nov. 3, 1919.

"Mr. C. H. Priester, Fort Deposit, Alabama.

"Dear Sir:

"I have your letter of the 31st ult., also the sample and in reply beg to advise that I will take the pecans you offer at 50c per pound delivered here by express for the largest and 40c per pound for the others. Immediate acceptance and shipment.

"We have a large crop this season and prices will go very low later on, and I am only making prices for immediate shipment. If, however, you have confidence in

the market and would be agreeable to shipping your pecans to me to sell on arrival for you, I will get you all I possible can for them and only charge you 10% for selling them, sending you your check the same day they reach here are sold.

"Hope to hear from you by return mail advising that you are making shipment, and assuring you they will have my best attention, I am,

Sincerely yours,
J. K. Lewis."

The witness continued: Mr. Lewis and I passed several letters with reference to the sale of pecans. The letter of November 3rd made me an offer for pecans. The only difference we had as to the price to be paid for them was that he wanted to give me fifty cents per pound provided I delivered them at New Orleans, and I wanted fifty cents per pound F. O. B. Fort Deposit.

On re-direct examination the plaintiff testified: I was never able to get anything more out of Mr. Lewis. I made an investigation as to his financial condition. I investigated to see whether he had anything, and he was not worth anything. I had no chance to make him pay for my pecans. I found out that he had no rating.

The Plaintiff here rested.

The defendant here offered in evidence the testimony of Miss Maud Miller, given by her on a former trial of this case, it being agreed that said testimony should be used at the present trial. Said testimony of said witness is as follows:

I am now employed by W. L. Shepard & Co. of Montgomery, Ala. I was in the employ of the Western Union Tele-

graph Co., at Greenville, Ala., on the 16th day of December, 1919. In that capacity I received messages over the telephone to be sent by people living in Fort Deposit, to be sent as telegrams.

Witness here identifies message as having been read to her over the long distance telephone from Fort Deposit, Ala., and written down by her on one of the regular blanks of the defendant company, said message and blank reading as follows:

"Western Union Telegram. Form 1207. Class of service desired. Telegram. Day Letter, Night Message, Night Letter. Patrons should mark an X opposite the class of service desired; OTHERWISE THE MESSAGE WILL BE TRANSMITTED AS A FULL-RATE TELEGRAM. Newcomb Carlton, President. George W. E. Atkins, First Vice President. Receiver's No..... Check..... Time Filed..... Send the following message, subject to the terms on back hereof, which are hereby agreed to.

"Fort Deposit, 12-16, 1919.

"To J. K. Lewis, Street and No. Wholesale Produce Co., 411 Poydras St., Place New Orleans, La.

"Offer you thousand or fifteen hundred pounds Frotchers pecans at fifty cents fob Ft. Deposit. Answer.

"12my, q-q, 1158 A. C. H. Priester.

"Senders address for answer. Senders Telephone Number."

On the reverse side of the blank on which said message was written was printed the following:

ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

To guard against mistakes or delays, the sender of a message should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated message is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED MESSAGE AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the message and this Company as follows:

1. The Company shall not be liable for mistakes and delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes and delays in the transmission or delivery, or for non-delivery of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the workings of its line; nor for errors in cipher or obscure messages.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this message is hereby valued, unless a greater value is stated in writing thereon at the time the message is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of the sender, without liability, to forward this message over the lines of any other Company when necessary to reach its destination.

4. Messages will be delivered free within one mile of the Company's office in towns of 5,000 population or less, and

within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

5. No responsibility attaches to this Company concerning messages until the same are accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

7. Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all foregoing terms.

8. No employee of the Company is authorized to vary the foregoing. THE WESTERN UNION TELEGRAPH COMPANY incorporated, Newcomb Carlton, President.

CLASSES OF SERVICE.

Telegrams, A full-rate expedited service.

Night Messages. Accepted up to 2:00 A. M. at reduced rates to be sent during the night and delivered not earlier than morning of the ensuing business day.

Day Letters. A deferred day service at rates lower than the standard telegram rates as follows: One and one-half times the standard Night Letter rate for the transmission

of 50 words or less and one-fifth of the initial rates for each additional 10 words or less.

SPECIAL TERMS APPLYING TO DAY LETTERS: In further consideration of the reduced rate for this "Special Day Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Day Letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day letters shall be written in plain English. Code Language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the addressee, and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

No employee of the Company is authorized to vary the foregoing.

Night Letters. Accepted up to 2:00 A. M. for delivery on the morning of the ensuing business day, at rates still

lower than the standard night message rates, as follows: The Standard telegram rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard telegram rate for ten words shall be charged for each additional 10 words or less.

SPECIAL TERMS APPLYING TO NIGHT LETTERS: In further consideration of the reduced rate of this special "Night Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A, Night Letters may at the option of the Telegraph Company be mailed at destination to the addressees, and the company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

No employee of the Company is authorized to vary the foregoing.

The witness continued: By referring to the message I can tell that the tolls for sending the message were 78 cents and 10 cents war tax. This was the regular rate for sending that number of words from Greenville to New Orleans at that time. No request that I can remember was made by Mr. Priester or the person who telephoned the message to me that same should be sent as a repeated message. The eighty cents paid the Western Union was the ordinary charge for the transmission and delivery of messages of that number of words from Greenville to New Orleans for unrepeated messages.

On cross examination the witness Maud Miller testified:

The message was sent as a paid message. It was charged to the telephone number at Fort Deposit of the Southern Bell Telephone Company.

I gave the operator at Fort Deposit the proper amount to collect. I gave her the proper amount to collect and then charged it to the Southern Bell Telephone Company. That was the custom there. I received messages frequently from Fort Deposit. When the message came over the line of the Southern Bell I charged the amount to the Southern Bell. I did not know Mr. Priester personally. I don't remember to have talked to him. I don't know who phoned the message to me. I sent the telegram as written down by me on the blank. I sent it just like it is written. I don't remember who it was I had the connection over the telephone with. The person who gave it to me requested me to write it.

On re-direct examination the witness Maud Miller testified:

The person that telephoned the message requested that I take it down. I couldn't charge messages to the telephone people at Fort Deposit, but I charged the message to the number she would give me. If she gave me a person's telephone I would charge it to that phone. It was not charged to the Southern Bell Telephone Company.

On re-cross examination the witness Maud Miller testified:

I did not collect any of the charges here in Greenville. I sent the amount to the Southern Bell Telephone Co. I did not know Mr. Priester. Some one phoned me to take the message, said "take a message," and I took the message.

The defendant here offered in evidence the telegram about which the witness Maud Miller had testified, which said telegram is the same as above set out in her testimony.

The defendant then offered in evidence against plaintiff's objection a certified copy by the Secretary of the Interstate Commerce Commission and under the seal of said Commission of the rules and regulations of the Western Union Telegraph Company, which were on file with the Interstate Commerce Commission on December 16, 1919, and which said rules and regulations are in words and figures as follows, to-wit:

INTERSTATE COMMERCE COMMISSION WASHINGTON.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of pages 255, 259, and 266 of the Western Union Telegraph Company Tariff Book, 1918, received on May 10, 1918, and of form 1206, received February 20, 1917, from the Western Union Telegraph Company; that said tariff Book and form were on December 16, 1919, and are now on file with the Interstate Commerce Commision.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 24th day of September, A. D. 1920.

George B. McGinty, Secretary of the Interstate Commerce Commission.

(SEAL)

Class of service desired

Telegram
Day Letter
Night Message
Night Letter

patrons should mark an X
opposite the class of service
desired; OTHERWISE THE MESSAGE
WILL BE TRANSMITTED AS A FULL-
RATE TELEGRAM

Form 1206
receiver's number
check
time filed

WESTERN UNION
TELEGRAM

NEWCOMB CARLTON, President.
George W. E. Atkins, First Vice-President

Send the following message, subject to the terms on back hereof, which are hereby agreed to

ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

To guard against mistakes or delays, the sender of a message should order it repeated, that is telegraphed back to the originating office for comparison. For this one-half the unrepeated message rate is charged in additon. Unless otherwise indicated on its face, THIS IS AN UNREPEATED MESSAGE AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the message and the Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of an unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending

the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for non-delivery of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this message is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the Company for transmission, and an additonal sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of the sender, without liability, to forward this message over the lines of any other Company when necessary to reach its destination.

4. Messages will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

5. No responsibility attaches to this Company concerning messages until the same are accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

7. Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.

8. No employee of the Company is authorized to vary the foregoing.

THE WESTERN UNION TELEGRAPH COMPANY,
Incorporated.
Newcomb Carlton, President.

Class of service
Telegrams. A full-rate expedited service.

Night Messages. Accepted up to 2.00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day. Night messages may at the option of the Telegraph Company be mailed at destination to the addressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Message at destination, postage prepaid.

Day Letters. A deferred day service at rates lower than the standard telegram rates as follows: One and one-half times the standard Night Letter rate for the transmission of 50 words or less and one-fifth of the initial rates for each additional 10 words or less.

SPECIAL TERMS APPLYING TO DAY LETTERS: In further consideration of the reduced rate for this special "Day Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Day Letters may be forwarded by the Telegraph Company as a deferred service and the transmission and

delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day letters shall be written in plain English. Code language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the addressee, and such delivery shall be a comlete discharge of the obligation such delivery shall be a complete discharge of the obligation

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

No employee of the Company is authorized to vary the foregoing.

Night Letters. Accepted up to 2.00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard telegram rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard telegram rate for 10 words shall be charged for each additional 10 words or less.

SPECIAL TERMS APPLYING TO NIGHT LETTERS: In further consideration of the reduced rate for this spe-

cial "NIGHT LETTER" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Night Letters may at the option of the Telegraph Company be mailed at destination to the addressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

No employee of the Company is authorized to vary the foregoing.

RULES. ACCEPTANCE OF MESSAGES FOR TRANSMISSION.

Rule 1. Classification of messages. Messages to be on message forms. Terms and conditions under which messages accepted. Dating of messages.

(a) All messages accepted for transmission shall be received subject to the classifications hereinafter set forth, and to the conditions and stipulations adopted for each of the respective classifications. When presented at an office of the Company, each message for transmission shall be written upon the form provided by the company for that purpose, or shall be attached to such form by the sender or his agent, so as to leave the printed heading in full view above the message.

All messages taken by the company are subject to the following terms:

To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back

to the originating office for comparison. For this, one-half the unrepeated message rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED MESSAGE AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the message and this Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for the non-delivery, of any unrepeated message beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for non-delivery, of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this message is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of the sender, without liability, to forward this message over the lines of any other company when necessary to reach its destination.

4. Messages will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns.

Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

5. No responsibility attaches to this Company concerning messages until the same are accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

7. Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.

8. No employee of the Company is authorized to vary the foregoing.

CLASSES OF SERVICE.

Telegrams. A full rate expedited service.

Night Messages. Accepted up to 2.00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day.

Day Letters. A deferred day service at rates lower than the standard telegram rates as follows: One and one-half times the standard Night Letter rate for the transmission of 50 words or less and one-fifth of the initial rates for each additional 10 words or less.

SPECIAL TERMS APPLYING TO DAY LETTERS. In further consideration of the reduced rate for this special "Day Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Day Letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day Letters shall be written in plain English. Code language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the addressee, and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

No employee of the Company is authorized to vary the foregoing.

Night Letters. Accepted up to 2.00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard telegram rate for 10 words shall be charged for

the transmission of 50 words or less, and one-fifth of such standard telegram rate for 10 words shall be charged for each additional 10 words or less.

SPECIAL TERMS APPLYING TO NIGHT LETTERS: In further consideration of the reduced rate for this special "NIGHT Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Night Letters may at the option of the Telegraph Company be mailed at destination to the addressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

No employee of the Company is authorized to vary the foregoing.

(b) Every message filed for transmission at an office or agency of this Company shall show as its point of origin the name of the city or town where such office or agency is located, and shall show the date when it is filed with this company, with the exceptions shown in paragraphs (c), (d) and (e) of this rule.

(c) A message from a point listed in the Tariff Book of this Company as a three-star or four-star point, telephoned by the sender to this company's office at the transfer point designated in the Tariff Book, for transmission, shall show as its point of origin the name of the city or town from which it is telephoned. Existing practices governing the acceptance of messages telephoned by the sender from a point where this company has an office or agency, at a

time when such office or agency is closed, may be continued in force until otherwise ordered.

(d) A message originating at a point on a connecting telegraph line at which there is no Western Union Office and transferred to the lines of this Company at the transfer point designated in the Tariff Book of this Company, shall show as its point of origin and as its date the name of the city or town where, and the date when, it was originally filed with the connecting company and need not show the name of the place where or the date when it is filed with this Company.

(e) A message originating with another Telegraph company at a three-star or four-star point in connection with which a transfer point preceded by the letter Z is shown in the Tariff Book of this company, and transferred to this company at the Z transfer point, shall show as its point of origin the name of the city or town where it was filed with the other telegraph company, preceded by the letter Z, and as its date the date when it was filed with the other telegraph company, and need not show the name of the place where or the date when it is filed with this company.

(f) No message received by this company for transmission shall bear a point of origin or date otherwise than in accordance with the foregoing.

Note: For instructions governing the forwarding of messages, see Rule 8.

ACCEPTANCE OF MESSAGES FOR TRANSMISSION.

RULE 4 (Continued) In the case of family messages signed by more than one member of the family, as for instance: "Mother and Father" "John and Emma" "H. A.

Brown and family". the entire signature will be treated as a single signature and there will be no charge for extra words.

When a signature consists of the name of a company or firm, preceded by the title of an official, the title and the name of the concern together constitute one signature and there are no extra words.

Examples: President Federal Rubber Co. Treasurer Adams Express Co. Cashier First National Bank, Agent Prudential Insurance Co.

2. All words added to the signature proper by way of description or identification of the sender, explanation or information to the addressee, whether such added words appear before or after the signature will be counted and charged for.

Examples of matter added to the signature by way of description or identification of the sender (extra words underscored): John Brown, President, 1 extra word, Geo. H. Wilson, General Manager, 2 extra words, Thomas Green, Agent, 1 extra word, Henry Jones, Receiver, I extra word, Union Trust Company, Trustee, 1 extra word, John Jones, Receiver American Mfg. Co. 4 extra words, John Jones, President American Shoe Mfg. Co. 5 extra words, Thomas B. Witherspoons of Dallas, 2 extra words.

Examples of matter added to the signature by way of explanation or information to the addressee, or to indicate by which particular branch or department of, or individual connected with a firm or concern, the message was sent or authorized (extra words indicated by underscore): Cronck Mfg. Co., Dept. 14, 3 extra words, Star Oil Co., Atlas Branch, 2 extra words, Atlas Branch, Star Oil Co., 2 extra words, John J. Ryerson & Son, Credit Dept. 2 extra

words, Ryerson, Credit, 1 extra word Studebaker, New York Export, 2 extra words, General Motors Truck Co., Division of General Motors Corporation, 6 extra words, Smith & Co., by John Smith, 3 extra words, American Shoe Mfg. Co., John Jones, President, 3 extra words, Annie L. Lowery Band of Mercy, John F. Cozens, Director, 4 extra words, Nash Motors Co., by John Johnson, 3 extra words, Nash Motors Johnson, 1 extra word, Packard Jones, 1 extra word, Chevrolet Campbell, 1 extra word.

The designation "Sr." "Jr." or 3rd added to the names of persons, and "Inc.", or "Ltd." added to the names of firms or corporations, form a part of the name and are not extra words when appearing in connection with a free address or signature. When appearing in the body of the message or in chargeable matter added to an address or signature, they will be counted and charged for.

For example, if a message is addressed or signed, "John Smith, Jr.", the "Jr." is not an extra word, but "John Smith, Jr" appearing in the body of a message will be counted as 3 words, and in an address, Continental Manufacturing Co., attention Mr. John Smith Jr., there are five extra words, and in a signature Smith Mfg. Co., by John Smith Jr., 4 extra words, as indicated by the underscore.

(f) When extra words in the address or signature are counted and charged for, the number of extra words will be indicated in the check. For example, where there are 10 text words and 3 extra words in the address or signature, the message, if a paid message, will be checked "13 paid 3 Extra" or if a collect message, will be checked "14 collect 3 extra."

(g) The words "Deliver and report charges," "Delivery guaranteed," "Report delivery," "Repeat back", and "Valued $....." in the check will be counted and charged for.

(h) The word "collect" in the check of a collect message will be counted but not charged for.

RULE 5. REQUEST TO REPORT DELIVERY. SPECIAL DELIVERY. REPEATED MESSAGES. VALUED MESSAGES, MESSAGES TO POINTS LISTED "SUB. FREE."

(a) If the sender requests a report of delivery the words "Report Delivery" will be placed in the check. (See Rules 4 (g); 32 (e).

(b) A message to be specially delivered beyond the free delivery limits of the terminal office, and for which the delivery charge is not given in the Tariff Book, will be accepted upon the payment or guarantee of an amount sufficient to cover the message tolls and the probable cost of delivery, and will carry in the check the words, "Deliver and report charges," when they are to be paid by the sender, or the words, "Delivery guaranteed," when they are to be paid by the addressee. (See Rules 4 (g); 35, 37.)

(c) If the sender requests a repetition of his message, the words "Repeat back" will be placed in the check, and an additional charge of one-half of the regular rate on the message will be made. The words "Repeat back" in the check will be counted and charged for. (See Rules 4 (g); 29.)

(d) If the sender wishes to value his message at a greater amount than FIFTY DOLLARS, he will be required to write on the face of the message the words "Valued at" and the amount at which he wishes to value the message, followed by his signature, for example, as follows:

"Valued at $100. John Brown."

The amount of the valuation will be shown in the check as follows: "Valued $100" and a charge of one-tenth of one percent will be collected from the sender in addition to the tolls on the message. The words "Valued $100" in the check will be counted and charged for.

(e) If the sender requests a repetition of the message and also wishes to value it at a greater amount than FIFTY DOLLARS, he will be required to write his valuation on the face of the message, followed by his signature, as provided in paragraph (d) above; the words "Repeat back" and the valuation will be placed in the check, as for example: "Repeat back valued $100"; and the charge for the message will be one and one-half times the regular tolls on the message, plus one-tenth of one per cent of the sender's valuation. The words "Repeat back valued $100" in the check will be counted and charged for.

(f) When a message is tendered destined to a one-star, two-star or three-star point, the listing of which shows an "other line" rate, and free service or a lower rate to telephone subscribers, as, for instance:

***Forest Hills. 25-0 (Sub. free) Richmond Hill.

**Hecktown. 50-0 Bethlehem (Tel. Sub. 10-0), the receiving clerk at the originating office will accept without question the statement of the sender that the addressee is or is not a telephone subscriber, as the case may be. If the sender states that he does not know whether the addressee is a telephone subscriber the "other line" charge will be collected, subject to refund as provided by rule 36.

Rule 22 (Continued). of Rule 6 (a), transmit the number of words, the abbreviation "Dly" and the amount paid for delivery. Example: Message checked "10 Paid 50 Delivery 25, "transmit check: "10 Dly. 25"

(c) Whenever the amount of tolls is shown in the check of a collect forwarded message, the figures representing the amount will be transmitted as a part of the check. (See Rule 8).

(d) Whenever the check of a collect message shows the amount of "this-line" and "other-line" tolls, for example: "11 Collect 50 and 25," transmit the full check.

(e) When a message is checked in the manner shown in the following examples: "10 CAK No..... and Paid 38", or "10 DH No..... and paid 20," or "10 Paid 25 and CAK No.....," or "10 Paid 50 and D. H. No.....," or "10 CAK No..... and CAK No.....," or "10 DH No. ..... and D. H. No.," transmit the full check, except the frank number and the amount of the tolls, as follows: "10 CAK and Paid," "10 DH and Paid," "10 Paid and CAK," "10 Paid and DH," "10 CAK and CAK," "10 DH and DH."

RULE 23. NUMBER, TIME AND PERSONAL SIGNAL.

(a) Write upon the face of each message sent the consecutive number to and the call of the distant office, the signals of the sending and receiving operators, and the time sent, in the order given.

Example: A23CH MA HA 815A.

(b) Do not regard the message as sent until acknowledged by the distant operator, unless several messages

have been sent in succession, when the acknowledgment of the last will be regarded as an acknowledgment of all.

(c) No operator will change his personal signal without the consent of the manager or chief operator, nor will any two operators in the same office use the same signal.

RULE 24. MESSAGES DELAYED IN TRANSMISSION:

Note the cause of delay on the back of the message or number sheet, when for any reason a message cannot be transmitted promptly. Also report the fact to the manager or chief operator.

RULE 25. ALL MESSAGES TO BE TRANSMITTED BEFORE CLOSING.

Transmit all messages to their destination or to the nearest relay office before closing. If for an unavoidable reason any are held over until the following morning, transmit them before new business.

RULE 26. ORDER OF RECEIVING.

(a) Copy each message as transmitted. Enter on the blank after the number of the message, the call of the sending office and the receiving operator's signal.

(b) Verify the check by counting the number of words. Make sure the message has been correctly received.

(c) Write the time received below the signature and acknowledge receipt by giving the sending office an "O. K." followed by personal signal.

RULE 27. MESSAGES TO MORE THAN ONE ADDRESS.

When a message is addressed, for example, to "A or B" for delivery to either, transmit it as a single message. When a message is addressed to "A and B", or to several persons, for delivery to each of them, transmit the check, place from, date, text and signature at one sending and fill in the addresses afterward so as to use the wire facilities to the best advantage.

RULE 28. DUPLICATE TRANSMISSION.

(a) If a second transmission is necessary in order to correct an error in a message, or for any other reason, begin the second transmission with the word "Duplicate." The receiving operator will write or stamp the word "Duplicate" conspicuously on the form above the message, also following the check.

(b) If the service message requesting a duplicate is signed by a branch office or by an individual employe, insert as a part of the address of the duplicate, before the destination, the word "care" followed by the name of the branch office or employee signed to the service message.

(c) Do not send a service message with a duplicate unless for some special reason.

RULE 29. TRANSMISSION OF REPEATED AND VALUED MESSAGES.

(a) Observe special care in sending or receiving a message bearing in the check the indication, "Repeat Back," or "Valued $....," or "Repeat back valued $...."

(b) Repeat back such messages at each stage of transmission from point of origin to destination.

(c) Make careful comparison with the original as the message is repeated back, underlining or checking each

word and, if found to be correct, write across the face of the message the words, "Repeated back O. K." followed by the signals of both operators.

RULE 30. EXAMINATION OF SENT MESSAGES FOR EVIDENCE OF TRANSMISSION. COMPARISON OF NUMBERS.

(a) Before closing the office for the night, carefully examine all "sent" messages to see that they bear the proper indication of transmission.

(b) Also examine the numbers, on messages sent and received, to see that none are missing. Compare numbers with the other offices with which messages have been exchanged during the day, correcting any errors discovered.

(c) Offices at which the closing hour is later than 12 midnight and offices open at all hours shall compare and close number sheets (which have not already been compared and closed) with offices in the same time belt at 12 midnight.

(d) Number sheets on circuits or channels which are closed at or prior to 12 midnight shall be compared and closed at the time the circuit is closed.

(e) When a circuit terminates at offices in different time belts, number sheets (which have not already been compared and closed) shall be compared and closed at the time corresponding to 12 midnight at the office located in the time belt farthest west. The office located in the time belt farthest west shall initiate the closing.

The defendant then offered to introduce in evidence a certified copy under the signature of the Secretary of the Interstate Commerce Commission and the seal of said Com-

mission of a report and order of said Interstate Commerce Commission entered May 17, 1917, in what is known as the Unrepeated Message Case, being numbered 8917 on the docket of said Commission and entitled J. L. Cultra and Myrtle Cultra, partners trading as the Clay County Produce Company, v. Western Union Telegraph Company, which said certified report and order are in words and figures as follows, to-wit:

INTERSTATE COMMERCE COMMISSION WASHINGTON.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of the report and order of the Commission filed and entered May 17, 1917, in the Unrepeated Message Case, No. 8917, J. L. Cultra and Myrtle Cultra, partners, trading as The Clay County Produce Company, v. Western Union Telegraph Company, the original of which is now on file and record in the office of this Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Commission this 23rd day of September, A. D. 1925.

George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal)

4480 INTERSTATE COMMERCE COMMISSION.

UNREPEATED MESSAGE CASE. NO. 8917.

J. L. Cultra and Myrtle Cultra, Partners, Trading as The Clay County Produce Company, v. Western Union Telegraph Company.

Submitted April 12, 1917. Decided May 17, 1917.

1. Although certain of its provisions are inapplicable, the general principles of the act to regulate commerce, as amended, together with many of its details, extended to telephone and telegraph companies engaged in the transmission of interstate messages.

2. The defendant's repeated, unrepeated, and special value rates for the transmission of interstate messages, with the restricted liability attaching thereto, being expressly sanctioned by section 1 of the act to regulate commerce, are binding upon it as well as upon all others when such rates have been lawfully fixed and offered to the public, and may not be departed from until they have lawfully been changed.

3. The defendant's unrepeated rate and the restriction attached thereto not shown to be unreasonable, and the complaint dismissed.

Hal R. Lebrecht and A. J. Bolinger for complainants.

Rush Taggart, Albert T. Benedict, and Francis Raymond Stark for defendant.

REPORT OF THE COMMISSION.

Harlan, Commissioner:

On March 21, 1914, Rodenberger & Company, commission merchants at San Francisco, deposited in the office of the defendant in that city a telegram properly addressed to the complainants at Clay Center, in the State of Kansas, advising them of the condition of the San Francisco market for poultry and kindred products. As the message reached the complainants at Clay Center, the part in which we are interested here, through an error by the defendant, was

made to read as follows: "Have sold car which you shipped." As accepted by the defendant at its San Francisco office for transmission that part of the message had read: "Haven't sold car which you shipped."

The conditions existing for some time at the San Francisco poultry market had led to a definite understanding between the complainants and their San Francisco brokers that the complainants would not make a further shipment until advised that the last preceding carload had been sold; with advice to that effect at hand, it was the understanding that the complainants might then let another carload go forward. In accordance with the understanding the complainants, upon receiving the message erroneously indicating that a previously shipped carload had been sold, permitted another carload then in transit to continue on its journey to the San Francisco market. On this shipment a loss of $1,790.83 was sustained, the direct result, as the complainants allege, of the defendant's error in transmitting the message.

To recover damages for the loss so incurred the complaints brought their action against the defendant in the Circuit Court of Jackson County, in the State of Missouri. The defense there interposed by the telegraph company was (a) that the court, by the terms of the contract under which the message was sent, was limited to an award of nominal damages only, even though the loss claimed was shown to have resulted from the defendant's negligence in forwarding the message; and (b) that the validity of the provisions in the contract restricting the defendant's liability to nominal damages was not within the competency of the state court to deny, but was a federal question which the Interstate Commerce Commission alone was authorized by the law to consider and deal with. In the light of that contention the trial court is holding the case in abeyance

pending a ruling by this Commission. The questions presented for our consideration, as stated by the complainants, are in substance as follows: (a) Whether the Congress, by the act of June 18, 1910, amending the act to regulate commerce, has vested in this Commission such jurisdiction over the rates and practices of telegraph companies as to bring under our control and within our regulating power the rules of such companies concerning their liability for damages incurred by reason of error or delay in the transmission or delivery of interstate messages; and (b) whether, if the Commission has such jurisdiction, the present rules of the defendant telegraph company, with respect to these matters, are reasonable and, as the complainants put the inquiry, whether they are consistent with a sound public policy.

To enable us to dispose of these important contentions with a minimum expenditure of time and effort the facts in the case were agreed to by the parties and submitted upon stipulation. The questions involved are of first impression with this Commission, but before undertaking to discuss them there are one or two other agreed facts that should first be understood because of their direct bearing upon the controversy:

The message, in the transmission of which the error complained of was made by the defendant, was a so-called night letter telegram, upon which the complainant's brokers at San Francisco paid the charges regularly fixed and established by the defendant for an unrepeated night-letter between the points in question. It was sent by the San Francisco brokers in answer to a telegraphic inquiry by the complainants and was offered to the defendant for transmission upon a telegraph blank bearing upon its face in clear, bold type this legend:

Send the following night letter subject to the terms on the back hereof, which are hereby agreed to.

On the back of the blank it was again noted in equally bold type that all night messages were subject to the terms there set forth at length. This was followed by a clause providing for the application of the standard 10-word day rate to a night letter of 50 words or less. Then followed certain other provisions which have always been interpreted by the defendant as limiting its liability for such an error in the transmission of an unrepeated message as was made in this instance, to the nominal sum of $50 as a maximum, together with the return of the toll paid upon the message. That was its contention in the trial court, as before stated, and the same defense is made here. Apparently the complainants do not deny that this was the intended purpose and meaning of those provisions, or that the different charges for repeated and unrepeated messages, with the restricted liability attached to them, had long been in effect; but they contend as a matter of law that the restrictive provisions have no validity or legal force. They assert that the defendant must therefore respond in damages in their action in the state courts without regard to those provisions and that the Commission has no jurisdiction in the premises. We are thus brought to a consideration of that question.

The provisions, so far as they pertain to the matters in controversy, read, with capitals and italics as they appear on the blank form as follows:

To guard against mistakes or delays, the sender of a night letter should order it Repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated night letter rate is charged in addition. Unless otherwise indicated on its face, THIS IS

AN UNREPEATED NIGHT LETTER AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the night letter and this Company as follows:

1. The Company shall not be liable for the mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED night letter, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED night letter, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in obscure night letters.

2. In any event the Company shall not be liable for damages for any mistakes or delay in the transmission or delivery, or for the non-delivery, of this night letter, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this night letter is hereby valued, unless a greater value is stated in writing hereon at the time the night letter is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one percent. thereof.

The act to regulate commerce was enacted on February 4, 1887, but it was not until the amendatory act of June 18, 1910, that telegraph and telephone companies were subject to its provisions and declared to be common carriers within the meaning and purpose of the act. By that amendment jurisdiction over the rates and charges of such companies was conferred upon the Commission, accompanied by the declaration that all such rates and charges must be reasonable and that any unjust rate or charge is unlawful. But the legislation by which these results were accomplished

requires a somewhat careful examination. Section 15 of the act, as then amended, authorizes the Commission in express language to hear complaints respecting rates and charges "for the transmission of messages by telegraph and telephone" and to hear complaints respecting "classifications, regulations, or practices whatsoever" of any carrier subject to the act. Under these provisions the Commission has entertained and heard complaints against telegraph and telephone companies and has made findings and entered orders requiring the correction of unlawful discriminations and preferences and enforcing, in their charges and practices, the standard of reasonableness ordained in section 1 of the act. By appropriate language section 15 also provides that the Commission has fixed the just and reasonable maximum rate or charge that may lawfully be exacted for the future by the carrier complained of, the latter shall not "demand or collect any rate or charge for such transmission in excess of the maximum rate or charge so prescribed"; it requires the carrier also to adopt, conform to, and observe, for the future, the regulations and practices prescribed by the Commission as just, fair and reasonable. It will thus be seen that the control of the Commission, after full hearing upon complaint over the rates, charges, and practices of telephone and telegraph companies is and has been regarded by the Commission and by the parties before us in those cases, as being almost as complete and comprehensive as it is over the rates and practices of the several other classes of carriers that are subject to our jurisdiction. In other words, no embarrassment or difficulty has been found in applying the general provisions of the act, as well as many of its details, to common carriers serving the public in the transmission of messages over telephone and telegraph lines between interstate points. Under section 20 we have also prescribed systems of accounts for interstate telegraph and telephone companies, which all such companies

are now observing; under the provisions of that section they also file annual and other reports with this Commission.

But some of the provisions of the act, notably sections 2 and 4, that were neither modified nor amplified but were left unchanged by the amendatory legislation in question, have been found inapplicable in their present form to telephone and telegraph companies. Section 6 is also inapplicable, in large part at least. It deals with the form and manner of filing, publishing, and posting the rates, charges, rules, and regulations of common carriers; but on its face section 6 relates only to carriers engaged or participating "in the transportation of passengers or property." Its terms are too definite to permit us to extend their application by construction to telephone and telegraph companies; and, although the rates, charges, rules, and regulations of such companies may be stated more briefly perhaps, and with less expense, than the rates and regulations of any other class of carriers under our jurisdiction, we have not felt, as stated in our annual reports to the Congress for 1911 and subsequent years, that authority has been given to the Commission under section 6 to require such companies to comply with its provisions when fixing and establishing their rates and charges. The particular defendant here, the Western Union Telegraph Company, has nevertheless voluntarily filed with the Commission its tariff book containing the bases of its rates and charges, as well as its rules, regulations, blanks, and other matters relating to the service it undertakes to perform for the public; but, so far as the specific requirements of section 6 are concerned, the rates, charges, rules, and regulations of telephone and telegraph companies may be and customarily are established and offered the public without first being published and posted with the Commission, a procedure

that must be observed by all other carriers under our jurisdiction before they may lawfully offer their services to the public or legally effect changes in their rates and practices.

Under the act, as has many times been said, the right to initiate their rates rests with the carriers. As section 6 does not apply to telephone and telegraph companies, it may well be said that in a special sense and to a special extent such companies do not initiate their charges. But it has not been thought or even suggested that a telephone or telegraph company, after having fixed and established a charge for a particular service, or a regulation pertaining to or affecting the rate or service, may depart from the charge, or from the regulation affecting the charge, at its discretion or until the charge or regulation has been lawfully changed by it. The courts have often said that the vital feature of the act to regulate commerce is to secure equality and uniformity as to all persons availing themselves of the services of common carriers and to destroy any favoritism by such carriers among those requiring their services. This principle, founded in the common right as well as in common justice, runs all through the act and through the supplementary legislation enacted in aid of the enforcement of the act. It can not therefore be doubted, and indeed the complainants here do not contend to the contrary, that even though section 6 is inapplicable to telephone and telegraph companies, when they have lawfully been fixed and offered to the public; and the rates and charges must be observed, together with the rules and practices affecting the rates and charges, until they have lawfully been changed, either voluntarily or under the orders of this Commission. Having been declared to be common carriers, and having been subjected to the general provisions of the act, it is manifest that telephone and telegraph companies may not lawfully accept or exact of

one person either less or more than they demand of another person for the same service. To secure such uniformity in their dealing with the public was doubtless one of the purposes of the Congress in subjecting telephone and telegraph companies to the provisions of the act to regulate commerce; and we think the language used by the Congress in doing this was sufficient to accomplish the end sought. It is scarcely necessary to add that there can be no uniformity in the application of the rates and charges of such companies unless such rules and regulations like those here under consideration, that directly affect the rates, are also enforced without discrimination or preference.

Almost from the beginning of telegraphy in this country the basic rate has been that charged for the transmission of an unrepeated message, the rates for repeated and special value messages being built upon it. The unrepeated rate or charge has always been made upon the condition, stated in the contract between the sender and the company, that no liabiilty should attach to the company for errors in transmission or delays in delivery beyond the sum received for sending the message. The higher rate for repeated messages, concurrently maintained for many years with the unrepeated rate, is predicated in part upon the additional service performed, and in part upon the liability of the defendant to make good any damages incurred, through error or delay in the transmission or delivery of the message, to the extent of fifty times the rate charged, with a maximum of $50. For a long time also the defendant has maintained still higher charges under which, upon the payment of one-tenth of 1 per cent of the amount of the assurance desired, the defendant, within the value so placed upon the message, assumes liability to the full extent of the loss sustained. The fundamental difference between the unrepeated rate and the other two classes of rates is

that under the former the sender assumes the risk of error or delay, while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves.

The complainants contend that rates, and rules of this kind affecting the rates, that limit the liability of a telegraph company for error in transmission are unreasonable, because it is the duty of such a carrier, under the charges paid to it, to transmit all messages correctly. This theory assumes that the rate for an unrepeated message must necessarily embrace the obligation to transmit it correctly and to respond in damages for the failure to do so. On that point in Primrose v. Western Union Telegraph Co., 154 U. S., 1, 25, it is said:

The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery, or in the nondelivery of a message.

The complainants urge, however, that, unlike a shipment of goods or express matter, a telegraph message in itself has no intrinsic value, and that any value placed upon it by the sender before a loss results from an error in its transmission or delay in its delivery can not be other than an arbitrary value. There is undoubted force in that view. But, on the other hand, the sender may more nearly esti-

mate the possible damage in the case of error in its transmission or delay in delivery than can the telegraph company. The sender of a telegram occupies much the same position as the consignor of an express package. In neither case is the value of that which is offered for transmission or transportation known to the carrier. In the case of a telegram, if the carrier is to assume the same degree of risk that is assumed by the express company under similar circumstances, the rate demanded is the repeated message rate, under which the liability of the carrier is limited to the sum of $50, unless a greater value is declared. For a greater value an additional charge must be paid. The same limitation of value is observed in the form of express receipt prescribed in Express Rates, Practices, Accounts and Revenues, 28 I. C. C., 131, 137, where it is said:

> The classification prescribed provides for valuation charges upon articles of higher value. In the case of shipments of extraordinary value, not only is the carrier entitled to notice of such value in order that its care may be increased, but it is also entitled to extra compensation for the increased liability and care.
>
> As before stated, the charge established by the defendant for the transmission of messages valued at more than $50 is one-tenth of 1 per cent of the excess value in addition to the repeated message rate.
>
> This special charge is the same as that found reasonable by us for a like liability in the transportation of express packages and is the usual insurance charge on shipments conveyed by parcel-carrying systems in other countries.—In re Express Rates, Practices, Accounts and Revenues, 24 I. C., le., 380, 397.

As has been said, the complainants cite many cases in which restrictions upon the liability of this defendant under

its several classes of rates have been considered and the restrictions are variously referred to as unjust, unconscionable, without consideration, utterly void, or as being contrary to sound public policy. We are asked by the complainants to announce the latter principle in this case. On the other hand, the defendant cites an equal number of cases in which courts of great authority have upheld the restrictive rates. We shall not undertake to review any of these cases here. It will suffice to say that, apart from the Federal legislation now under consideration, the complainant's action, if brought in some state courts would apparently meet with success, while if laid in the courts of other states would result in failure. This lack of uniformity among the courts, when dealing with the defendant's rates and the rules and regulations affecting its rates for the transmission of interstate messages, to some extent may explain the legislation by which the Congress has put all telephone and telegraph companies engaged in the interstate transmission of messages under our jurisdiction. But whatever may have occasioned the amendatory legislation, one of its necessary consequences, under the language used, has been to put an end to this diversity in results; so that, as will be seen further along in this report, the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be construed as attaching to the defendant's error the same degree of responsibility in all the courts.

The complainants, however, direct attention to the so-called Carmack amendment, which was a part of section 20 of the act to regulate commerce when the night message described of record was sent. That amendment, however, relates to the liability for loss, damage, or injury to property in transit caused "by any common carrier, railroad, or

transportation company, to which such property may be delivered" for carriage, and is therefore another provision in the act that is inapplicable to telephone and telegraph companies. Largely on the omission there of any reference to carriers of this class, the complainants base their contention that the Commission is without jurisdiction to deal with the matters involved in this case but must leave them to the courts to adjust. The point they make is that as the Congress "has not seen fit to regulate the liabilities of telegraph companies to respond in damages for carelessly transmitting interstate messages * * * the law of the sovereign state is still in force"; and they ask the Commission so to declare in order that they may proceed with their action for damages in the state court. But the silence of the Carmack amendment with respect to telegraph companies and their liability for errors in the transmission of interstate telegraph messages can not controlling with respect to our jurisdiction, if under other provisions of the act the matters in controversy here are brought within our cognizance. This we think is the case.

In extending the provisions of the act to telephone and telegraph companies, the Congress further amended section 1 by incorporating in it a clause reading as follows:

That messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages.

If, as a matter of law, as the complainants contend, the rate charged and collected for an unrepeated message carries with it the same protection to the sender or recipient and imposes upon the telegraph company the same liability and degree of care as the rate for a repeated message, then

the express authority by the Congress to maintain classifications of repeated and unrepeated messages, with the different rates attached thereto, is without significance or effect; for no useful purpose would have been served in authorizing the two classifications taking different rates without recognizing the fundamental difference between them that for years has been well understood and maintained. It seems clear, therefore, that the Congress in recognizing, by the amendment to the act above quoted, these three classes of messages with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject of course to the general provisions in the act requiring all rates, and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed. Abundant authority for this view is found in numerous decisions by the State and Federal courts. In Boyce v. Western Union Telegraph Co., 89 S. E. (Va.), 106, 108, it is said:

* * * Congress, by the act of June 18, 1910, seems to recognize the necessity and validity of such stipulations and to authorize the making of such contracts with respect to repeated and unrepeated messages.

* * * So that telegraph companies have here the direct authority and sanction of Congress to classify their messages into repeated and unrepeated and to charge different rates for each; in other words, to enter into the very contract which was made in this case.

See also, the same effect, Western Union Telegraph Co. v. Dant, 42 App. D. C. 398; Western Union Telegraph Co.

v. Bank of Spencer, 156 Pac. (Okla.), 1175, 1179; and Haskell Implement & S. Co. v. Postal Telegraph-Cable Co., 96 Atl. (Me.), 219, 223. In the latter case it was held by the supreme judicial court of the state of Maine that, so far as interstate messages are concerned, the state courts have no jurisdiction over questions of classification and regulation, or respecting the reasonableness of rules and charges or the limitation of the carrier's liability, and that such cases must be submitted for the determination of the Interstate Commerce Commission, as in the case of other common carriers coming within the administrative competence of that Commission.

Our conclusion upon the record is that the Congress, by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy but on the contrary are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful.

The complaint must therefore be dismissed, and it will be so ordered.

## ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 17th day of May, A. D., 1917.

UNREPEATED MESSAGE CASE. NO. 8917.

J. L. Cultra and Myrtle Cultra, Partners, Trading As The Clay County Produce Company, v. Western Union Telegraph Company.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

(Seal) George B. McGinty, Secretary.

The plaintiff objected to the introduction of said certified copy of said report and order on the ground that it is illegal and irrelevant, and because it is the decision of another Court in another case and not applicable to this case.

Upon the Court making known that it would sustain the objection to the introduction of said certified copy of the report and decision of the Interstate Commerce Commission in said case, the defendant made known to the Court that said order of said Interstate Commerce Com-

mission in said case was offered for the purpose of showing that the Interstate Commerce Commission had recognized to be valid and binding the stipulations and provisions written on teh back of the message sent by the plaintiff in this case and had further recognized and held to be binding and valid the classifications of messages into repeated and unrepeated messages, as shown by the stipulations on the back of the message sent by plaintiff in this case; and further that said order was offered for the purpose of showing that the Interstate Commerce Commission had recognized and held to be valid and binding the regulation of the telegraph company limiting the valuation of messages not specially valued at the time they are offered to the Company for transmission at not more than fifty dollars. The Court sustained the objection of the plaintiff to the introduction of said order of the Interstate Commerce Commission and to the action of the Court in sustaining said objection and in refusing to permit the defendant to introduce a certified copy of said order the defendant then and there duly and legally excepted.

Mr. Mike Dantoni, a witness for the defendant, testified on direct examination as follows: I live at New Orleans, La. I am a telegraph operator. I have been engaged in that business about ten years. I am now employed by the Western Union Telegraph Company and was employed by them at New Orleans on December 16, 1919. I was employed at the Cotton Exchange Office, which was located on the corner of Gravier and St. Charles streets. Most of the commercial messages coming to New Orleans are first received at the main office. Some of them go to the Cotton Exchange and some to the branch offices, but the regulations are that the messages go to the main office. Messages from the main office were sent to the Cotton Exchange branch by an underground tube.

The witness was here shown a telegraphic message marked Exhibit A and asked if he had ever handled that message. He testified:

I remember that message. That is my sign on it, "Da". I don't remember handling the message, but that is my sign all right. I sent it from the Cotton Exchange over to the branch office, the Board of Trade. From the Cotton Exchange over to the Board of Trade branch office, which is located at Gravier Street and Natchez Alley, is about four and a half or five blocks. In sending messages from the Cotton Exchange office to the Board of Trade office you read the copy and send it over the wire. Telegraph signals are sent over a wire by dots and dashes. A dot is the touch of the key,—that is, the sending operator touches the key and makes a dot. When he touches the key that makes or completes the electric circuit. At the other end of the circuit a corresponding sound is heard, corresponding to the length of time the key is held down. To make a dash you hold the key down a little longer than you do for a dot. The receiving operator distinguishes between a dot and a dash by the sound, that is, by the length of time the noise continues. The telegraphic symbols for the word "fifty" are as follows: F, dot, dash, dot. I, two dots. F, dot, dash, dot. T, small dash. Y, two dots, space, two dots. The telegraphic symbols for the word "fifteen" are: F, dot, dash, dot. I, two dots. F, dot, dash, dot. T, small dash. E, dot. E, dot. N, dash, dot. I sent the message shown on Exhibit A over the wire to the Board of Trade office as it appears in this copy. Tom Engle received it at the other end. You ask what is meant by a space, you make two dots, that is you give a little space between, then you give two dots after. You give just a very small interval of time for the space. Any experienced operator can tell a space. I sent the message correctly over to the Board of Trade office. It was taken over the wire from me. All mes-

sages are sent over the wire by Morse symbols. New Orleans is a large city with more than three hundred thousand inhabitants. A great many commercial telegrams are handled in the downtown section, and there are numerous branch offices in that part of the town for handling messages. That is the way business is handled and disposed of from one office to the other. The message was sent from the main office to my place and I sent it to the Board of Trade because it is quicker service to handle them in that way. I have lived in New Orleans all my life. I am no relation to Mr. Priester of Fort Deposit, and I never had seen him until I came to Greenville in connection with this case. I don't know J. K. Lewis. I have never had any bad feelings, anger or resentment toward either Mr. Priester or Mr. Lewis. The telegraphic equipment which I used in the office over which the message is sent is a recognized standard telegraph machine, the best in use. This message was received by me with no instructions to repeat it, and there was nothing to indicate that it was other than an unrepeated message. The message was not sent as a valued message.

The defendant here offers in evidence the telegram as identified by said witness, marked Exhibit A, which is in words and figures as follows:

Received at Sw. Cor. Gravier and St. Charles Sts. New Orleans, La.

Exhibit A

'WESTERN UNION TELEGRAM. C177An 15 1919 Dec. 16 Pm 1 09 Fort Deposit Ala 1138A 16, J. K. Lewis Wholesale Produce Co. 411 Poydras St New Orleans, La. OFFER YOU THOUSAND OR FIFTEEN HUNDRED POUNDS FROTCHERS PECANS AT FIFTY CENTS FOB FT DEPOSIT ANSWER. C. H. Priester."

On cross-examination the witness testified as follows: The message as contained on Exhibit A is the one which I received through the tube. It read fifty cents. That is the way it got to me, through the tube to the Cotton Exchange. I was at the Cotton Exchange branch, and the message came to me through the tube from the main office in New Orleans. Most of the messages sent from outside the city of New Orleans are first received at the main office, unless they relate to cotton transactions. Some of the cotton concerns have direct wires to the Cotton Exchange from the outside. I don't know who the operator was who received the message at the main office. I guess it is about three hundred miles from Fort Deposit to New Orleans. The message got from Greenville to New Orleans all right. The message must have been phoned from Fort Deposit to Greenville and got on the wire at Greenville and went three hundred miles to New Orleans correctly and then correctly sent it over the wire to the Board of Trade branch office. The machine which I used was the best in modern use, and was working all right that day. I know that I made no mistake in sending the message, but sent it correctly. I know that because I had it right before me, and I sent it just like I read it. I made the right sort of dots and dashes and everything in spelling out fifty instead of fifteen. That is the way I sent it to Engle, who was about three or four blocks from my office. A block is about three hundred feet long, and it must have been about three or four hundred yards from my office to the Board of Exchange office. I didn't have to send that message over the wire but three or four hundred yards. It is about seven or eight blocks from the Cotton Exchange office to 411 Poydras Street. From 411 Poydras Street to the Board of Trade is about three and one-half blocks. Engle was at the Board of Trade branch office. I have passed by 411 Poydras Street on the street, but never did notice anybody there. I never saw Mr. Lewis. I did not buy any pecans

along about that time. I did not know anything about those pecans. I had had the message about four or five minutes before I sent it to the Board of Trade. I guess I sent about two hundred and fifty messages that day. I have no distinct recollection about sending this particular message. I know I was careful all right in sending it. I have no distinct recollection of sending any of those messages. I am careful in sending business messages. The symbols for the word fifty and the word fifteen, so far as the Y in fifty and the EE and N in fifteen are concerned, are entirely different. The dots and spaces are different. The sound is different. I can tell them distinctly. I know I did not make any mistake in sending that message. The message as sent by me read fifty instead of fifteen. I have been an operator ten or eleven years. In 1919 I had been an operator about one and a half or two years. I had been an operator in the main office of the Western Union for a year and a half or two years. That was all the experience I had had. An expert operator would know the difference between the symbols for fifteen and fifty, but any experienced operator could make an error. Plaintiff here asked witness if with ordinary care an experienced operator could make a mistake in sending fifteen for fifty. The Court sustained defendant's objection to this question. Witness was also asked if a careful operator would make that mistake. The Court sustained defendant's object to this question. I fully understood my business, and I knew the difference between fifteen and fifty and at that time knew the difference in the symbols between fifteen and fifty. I knew exactly how to make the dots and dashes for fifty and how to make the dots and dashes for fifteen. The original paper marked Exhibit A came through the tube and was kept in our office after I had transmitted the message to Engle over the wire. I knew Engle at that time. I can't say just how long I had known him. I knew it was Engle I was sending the message to by his sign. He was on duty there that day.

His sign shows that he was on duty at 1:35. His sign is on the message which is shown me. He put his sign on the message when he received it. That is the customary way of doing it. I sent the message over the wire to Engle as follows: 'Ft. Deposit Ala. "J. K. Lewis Wholesale Produce Company 411 Poydras St. New Orleans, La. OFFER YOU THOUSAND OR FIFTEEN HUNDRED POUNDS FROTCHER PECANS AT FIFTY CENTS. ANSWER.

C. H. Priester."

I had the message there, looked at it and read it when I sent it to Engle. That is the way I sent it just exactly like that. This message did not come straight from Greenville to New Orleans, but was relayed to Atlanta, and then came to New Orleans. I don't know whether it came through Montgomery or not. An experienced telegraph operator with the number of years experience which I had had could tell the difference between the symbols in fifteen and fifty. The message was sent according to the Morse Code. If the word fifty is written out in a message it is sent as written, but if figures are used in the message we send the symbols for the figures. The same way as to the word fifteen. The symbol for F is a dot, dash, dot, so when I touched the telegraph instrument the steel point in Engel's room made the letter F, dot, dash, dot, and that represented the letter F. I is two dots, one right after the other, a little fast, F was the same as the first F, then the T was a little dash, the Y was two dots, space two dots. EEN is, E, dot, E, dot, and the N is a dash, dot. As just stated a Y is two dots, space, two dots. I am still employed by the Western Union Telegraph Company at the Cotton Exchange in New Orleans.

Mr. T. J. Engel, a witness for the defendant, testified on direct examination as follows: I am employed as a telegraph operator for the Western Union Telegraph Company at New Orleans, and have been employed there for twelve

years. I have had about twelve years experience as a telegraph operator. I was employed by the Western Union at the Board of Trade branch office, New Orleans, December, 1919. The Board of Trade office was on Gravier Street and Natchez Alley.

The witness was here shown copy of a telegram marked Exhibit B. dated Fort Deposit, Alabama, 11:38 A. M. 12-16-19, reading: "J. K. Lewis, N. O. La. Offer you thousand or fifteen hundred pounds Frotiers at fifteen cents FOB Deposit. Answer. C. H. Priester." and identified said message as having been handled by him.

Continuing, the witness testified: I know I handled that message by my sign, which is on it. My sign is AP. I received the message over the telegraph wire from the Cotton Exchange. The Board of Trade Office is four blocks from the Cotton Exchange office. 411 Poydras Street is about three blocks from the Board of Trade office. I don't remember whether I received many messages for J. K. Lewis on Poydras Street. I don't know Mr. Lewis personally, nor did I know C. H. Priester personally. I never saw either one of them before the message in question was received. I never had any business dealings with either of them, nor did I have any feeling of anger, ill will or anything of that kind towards either of them. I took this message down at the Board of Trade office by listening to the ticking of the telegraph instrument. The message was sent by the Morse alphabet, and I wrote it down on the typewriter. I took it down on the typewriter as the instrument sent the message to me at my desk. I wrote it down exactly as I understood the symbols to come over the wire. I did not handle the telegrams which I received. The telegram marked Exhibit B and which I have identified, is a carbon copy. The original was delivered to Mr. Lewis. I made two copies at the same time, and the original was given to the messenger boy

to be delivered to Mr. Lewis. That is the only transaction I had in connection with the message. The original message was written on a received blank. The receiving message is written on form 1207, which is used for writing original messages as filed with the Company for transmission. Messages as received are written on Form 1207. The telegraph company does not give out or distribute the blanks on which messages as received are written. They do not let them get out of the office at all. The telegraph symbols for fifty are: F, dot, dash, dot, I, two dots, F, dot, dash, dot, T, short dash, Y, two dots, space, two dots. The telegraph symbols for fifteen are: F, dot, dash, dot, I two dots, F, dot, dash, dot, T, short dash, E, dot, E, dot, N, dash, dot. I understood those symbols in December, 1919, very well and I wrote the word fifteen just as soon as it came to me over the instrument.

On cross-examination the witness testified: I had been an operator at the time this message was received about nine years. I don't remember exactly how long I was at the Board of Trade when I got this message from the Cotton Exchange. Dantoni, the operator at the Cotton Exchange, sent the message to me. I knew him. We were in the same city and right close together, and I recall that I worked in the same office with him at one time. He signed that message to me. He gave me his sign. I knew his sign as well as I did his name. I know the difference between the symbols for fifteen and fifty. There is a difference between the symbols for fifteen and fifty. There is a difference between the symbols for "een" in fifteen and the "y" in fifty. They are entirely different, and any competent operator can tell the difference. I was a competent operator. I took the message down just as it came over the wire. I took it down exactly as it came. I can not be mistaken as to that. I wrote it out just as I received it, and just as shown on the carbon copy which I have iden-

tified. I wrote it down correctly from the sound of the wire, that is, by the sound made when Dantoni touched the key in his office. When he touched the key I got the sound of the symbol in my office. I wrote it down exactly as I heard it over the wire. The carbon copy marked Exhibit B is the one which I made. It was kept in the office, and the original was sent by messenger. I did not know Mr. Lewis. I did not tell the boy where to take it. We had a clerk to do that. The clerk can tell where the people live in the city. If he wants to find somebody he goes and looks at the phone book. I did not know Mr. Lewis, did not know where he lived, never had heard of him, did not know his street address, and had nothing to do with him. I did not know anything about the price of pecans. You ask me to explain to the jury how I could send that message out addressed to J. K. Lewis, New Orleans, without any street number. I don't know. The clerk knew them all. The Clerk and the messenger boys knew about everybody. They knew Lewis and knew where his office was. I never passed by there that I remember. I handle five hundred messages a day. I know where I live in New Orleans. Lewis was not in our part of town. 411 Poydras Street was about three blocks or about 300 yards from the Board of Trade Office. I did not know anything about Lewis' address at that time. I haven't found out since, and I don't know it today. The message was received at the main office, then sent to the Cotton Exchange by tube, and the Cotton Exchange wired it to the Board of Trade office to be delivered. It was sent to the Board of Trade office because its destination was in the Board of Trade territory. I sent this message out just like I took it down. The copy shows fifteen, and it was sent out that way. If the message had been sent to me over the wire as fifty I would have known the difference between fifty and fifteen. I swear that I took it down correctly. I took it down fifteen, and that is the way it was sent to me.

Plaintiff's attorney here showed witness the telegram of J. K. Lewis to C. H. Priester, dated December 16th, 1919, offering to take fifteen hundred pounds pecans hereinabove set out and asked him if he knew anything about it. He answered no, that it was not handled by the Board of Trade, that it was handled by the Poydras street office, which was called the Produce Office. Being asked if Lewis must have been in the Poydras Office territory he answered: That is where they are close they go to Poydras, I would think they would go in there.

On re-direct examination the witness Engel testified:

The main office of the Western Union at New Orleans is about in the middle of the business district. It is a very congested business district. The Cotton Exchange is there. It is about a block from the main office to the Cotton Exchange. There is very much business handled by the Cotton Exchange office. We have quite a few branch offices down in the business district at New Orleans. The reason they are sent from one branch office to the other is to get quick service. The Board of Trade office is the nearest office to 411 Poydras Street, and the message was received by dots and dashes. The making and breaking of the electric circuit is instantaneous. It does not take any longer for a telegraph symbol at the Cotton Exchange to be sent over to the Board of Trade Office at New Orleans than it would from the Cotton Exchange to New York City, if there was a direct line in operation. It is all instantaneous.

On re-cross examination the witness testified: In sending a wire to New York there might be some little interruption. If you have a good wire you can send it correctly from New Orleans to New York. The instrument which was in use and in my office was the best in use and in perfect condition.

On re-direct examination the witness testified: You ask what are the causes of interruption in a wire. In a long wire you are likely to have rain, wind or induction of some kind. That could happen on a long wire and it could happen on a short wire. We have lots of trouble on short wires. At the time I received this message it was coming over the wire and I wrote it on the typewriter. I took it as came over the wire, and wrote it on the machine at the same time. I was paying attention to my typewriter.

THE DEFENDANT HERE CLOSED.

Mr. C. C. May, a witness for the plaintiff, testified on direct examination in rebuttal as follows: I am at present the Clerk of the Circuit Court of Butler County, Alabama. At one time I was a telegraph operator for a little over twelve years. I worked for the L. & N. Railroad and the Western Union Telegraph Company. I had experience in sending and receiving messages. In sending telegraph messages the Morse Code is the one that is used. The symbol for the letter F is dot dash dot. I have heard the testimony of the witnesses as to symbols for fifty and fifteen, and the testimony as given is correct. The symbol for the letter "t" in fifty is entirely different from the symbols for the letters "een." Any competent operator with experience can tell the difference between the symbols for the letter "t" and the letters "een". The symbols for the letter "y" is entirely different from the symbols for "een" and a competent operator would know the difference between the symbols for the letter "y" and the letters "een." If a message is sent with the word fifty spelled out and is transmitted over the wire with the apparatus in perfect working condition it would be received as fifty. It would not be received as fifteen. Both instruments would make the same dot at the same time. A man touches the key and that makes an impression of the letter in the receiving office. If fifteen

is received the man from whom it is sent would send fifteen over the wire, and if fifty was sent over the wire it would be fifty in the receiving office.

On cross-examination the witness testified: If fifty was sent from the main office the impression in the receiving office would not be fifteen. It would be the same impression that was sent. The receiving operator gets the message from listening to the sound of the breaking of the electric circuit. The impression goes through the ear, then to the brain, then through the finger, and then to the typewriter.

THE ABOVE AND FOREGOING WAS ALL OF THE TESTIMONY IN THE CASE.

THEREUPON the Court charged the jury orally as follows:

Gentlemen of the Jury:

The plaintiff in this case C. H. Priester, brings suit against the Western Union Telegraph Company and claims $358.10 as damages which he alleges is due to him by the defendant for that on December 16, 1919, the plaintiff delivered to the defendants' agents at Fort Deposit and Greenville for transmission to one Lewis in New Orleans a certain telegram which is described in the complaint which reads—I offer you a thousand or fifteen hundred pounds of Frotchers pecans at 50 cents fob Ft. Deposit. Answer. C. H. Priester, and he alleges that after the telegram was delivered by him to the defendant for transmission the defendant in the transmission of that telegram made an error or mistake in its transmission so that when it reached Mr. Lewis, to whom it was addressed, it read—Offer you thousand or fifteen hundred pounds Frotchers pecans at 15

cents a pound fob Ft. Deposit. Answer. C. H. Priester; and he alleges that after this telegram was sent that he shipped the pecans on receipt of a telegram from Mr. Lewis accepting his offer, that he shipped him a thousand pounds of pecans and that he paid him only fifteen cents a pound for them and that he was damaged in consequence of the plaintiff's negligence in the transmission of the telegram the amount of the difference between fifty cents and fifteen cents per pound for the pecans.

The plaintiff contends that the reasonable cash market value of the pecans at that time at Ft. Deposit free on board of the cars was fifty cents per pound.

The plaintiff contends that the mistake in the transmission of the message by the defendant was due to the negligence of its servants and agents in the performance of their duty.

In the second place the plaintiff alleges that the negligence of the defendant in the transmission of this telegram by its servants and agents was gross negligence. In two counts of the complaint he alleges practically the same thing, that the damages which he contends for was by reason of the sending of the message, sending the telegram, and that it was gross negligence of the defendant, its agents and servants, in and about the transmission of the telegram.

Now the defendant in answer to the complaint denies the allegations contained in it—that is its plea of general issue.

In the second place the defendant insists in answer to the first count of the complaint that this message which was delivered to it by the plaintiff for transmission of it to Mr. Lewis at New Orleans as an interstate message—

that it, to say it was sent from a point in Alabama, to a point in Louisiana, New Orleans. That it was an unrepeated message and that the regulations on file with the defendant, the Western Union Telegraph Company by the Interstate Commerce Commission at Washington provides that whenever an error or a mistake occurs in the sending of an interstate message, an unrepeated message, the liability to the defendant for any damage resulting from the error in transmission of the message is limited to the amount that was paid by the plaintiff to the defendant for the sending of the message.

Now, the burden of proof in the first place is on the plaintiff to reasonably satisfy you that he delivered to the defendant or to the defendant's servants or agents a telegram to be transmitted to J. K. Lewis Produce Company at New Orleans, La., and that he paid the defendant the toll for the transmission of that message.

Then, in the next place the burden of proof is on the plaintiff to reasonably satisfy you that the message was incorrectly transmitted to Mr. Lewis to whom it was sent.

Now, if you find that to be true, that he did deliver the message to the defendant and that the defendant undertook to send it, and that there was a mistake in the message, and that the message read fifteen cents instead of fifty cents per pound as is contended, then the next question you would determine would be whether or not the mistake was committed by the defendant, its agents or servants. If it was, under what circumstances was the mistake committed? Now, if you find those facts to be true, that an error was made—

Mr. Powell: In order to get the matter simplified we withdraw the first count of the complaint and rely on the

last two counts of the complaint, and let remain as far as applicable the last two counts.

The Court: So it becomes a question for you to say whether or not the defendant's servants or agents in the transmission of the telegram was guilty of gross negligence in and about its transmission as alleged in the complaint. If it was, the plaintiff would be entitled to recover. If it was not the plaintiff would not be entitled to recover. That is all there is in the case.

The Supreme Court in defining negligence says: Negligence is a failure to bestow the care and skill which the situation demands. In other words it was the duty of the defendant in the transmission of this telegram to handle it with the care and with the skill the situation demanded; it was the duty of the defendant to provide itself and its servants and agents with proper instruments for the transmission of the message and with skillful operators for the operation of those instruments. So that the question you are to determine is whether or not under the conditions and circumstances under which this message was delivered and transmitted, the defendant through its agents and servants did bestow the care and skill which the situation demanded they should bestow. If they did and there was a mistake in the transmission of the message the plaintiff could not recover, but if they did not the plaintiff would be entitled to recover the damages which the testimony, after you have considered it all, shows the plaintiff suffered by reason of the error or mistake of the defendant. That is all there is in the case.

You take the testimony of all the witnesses both for the plaintiff and for the defendant, the testimony that was delivered in your presence and the other testimony that was

read to you and consider it all and let your verdict speak what you believe to be the truth of it.

If you find for the plaintiff then you would assess the amount of the plaintiff's damages as shown by the testimony in the case, calculate the interest on it from December 16, 1919, to this date at 8% per annum, add the interest to the principal and that would be the plaintiff's damage, and in that event you would say by your verdict, We, the jury, find for the plaintiff, and assess the plaintiff's damages so many dollars, whatever sum you find.

If you find for the defendant your verdict would be, We, the jury, find for the defendant.

Whatever form your verdict takes, write it on the back of the complaint and one of you gentlemen sign your name to it and write the word, Foreman, after it.

Before the jury retired the defendant duly and legally excepted to the following portion of the Court's oral charge:

"The Supreme Court in defining negligence says: 'Negligence is a failure to bestow the care and skill which the situation demands. In other words, it was the duty of the defendant in the transmission of this telegram to handle it with the care and with the skill the situation demanded; it was the duty of the defendant to provide itself and its servants and agents with the proper instruments for the transmission of the message and with skillful operators for the operation of those instruments." And the Court duly allowed said exceptions.

The defendant also before the jury retired duly and legally excepted to the Court's oral charge to the jury:

"So that the question you are to determine is whether or not under the conditions and circumstances under which this message was delivered and transmitted the defendant through its agents and servants did bestow the care and skill which the situation demanded they should bestow. If they did and there was a mistake in the transmission of the message the plaintiff can not recover, but if they did not the plaintiff would be entitled to recover the damages which the testimony, after you have considered it all, shows the plaintiff suffered by reason of the error or mistake of the defendant." And the Court duly allowed said exception.

Thereupon and before the jury retired the defendant requested the Court to give to the jury the following written charges, numbered 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, and 14, separately and severally, but the Court refused to give said charges, or any of them, and marked upon each of said charges "Refused, Gamble, Judge."

"3. If you believe the evidence in this case you cannot find a verdict for the plaintiff under the sixth count of the complaint."

"4. If you believe the evidence in this case you cannot find a verdict for the plaintiff under the seventh count of the complaint.

"6. If you believe the evidence in this case you cannot return a verdict for the plaintiff under the sixth count of the complaint for more than the amount paid for the message, together with interest thereon."

"7. If you believe the evidence in this case you cannot return a verdict for the plaintiff under the seventh count of the complaint for more than the amount paid for the message, together with interest thereon."

"8. I charge you that under the evidence in this case you cannot find that the defendant or its servants, agents or employees were guilty of gross negligence in and about the transmission or delivery of the telegraph message described in the complaint."

"9. I charge you that under the evidence in this case you cannot find that the defendant or its servants, agents or employees were guilty of wilful misconduct in and about the transmission or delivery of the telegraph message described in the complaint.

"10. I charge you that a mere error made in the transmission of a telegraphic message in and of itself is not sufficient to authorize you to find that the defendant or its servants, agents or employees were guilty of gross negligence in and about the transmission or delivery of the telegraphic message described in the complain."

"11. I charge you that the plaintiff Mr. Priester having sent the message described in the complaint as an unrepeated message and the liability for errors on the part of the defendant in and about the transmission or delivery of unrepeated messages being limited by law and the rules and regulations of the telegraph company on file with the Interstate Commerce Commission to the amount paid for the transmission and delivery of such message, the plaintiff is estopped to claim that his damages on account of the error made in the transmission of said message are greater than the amount paid for said message, together with interest threon."

"12. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, the provisions

of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), the liability of the telegraph company for the error made in the transmission of the message described in the complaint is limited to the amount paid for its transmission and delivery, with interest thereon, regardless of whether or not you believe from the evidence that such mistake was due to simple negligence or gross negligence on the part of the defendant telegraph company, its servants, agents or employees."

"13. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), the liability of the telegraph company for the error made in the transmission of the message described in the complaint is limited to the amount paid for its transmission and delivery, with interest thereon, regardless of whether or not you believe from the evidence that such mistake was due to simple negligence or gross negligence on the part of the defendant telegraph company, its servants, agents or employees."

"14. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County

Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), the liability of the defendant telegraph company was limited to the amount paid by the plaintiff in this case for the transmission and delivery of the message with interest thereon."

And the defendant duly and legally excepted separately and severally to the action of the Court in refusing to give said written charges, separately and severally.

Upon the refusal of the foregoing charges requested by the defendant in writing the defendant thereupon requested the Court to give to the jury written charges numbered 15, 16, 17, 18, 19, 20, 21 and 22, separately and severally, but the Court refused to give said charges or any of them, but indorsed upon each of said charges "Refused, Gamble, Judge," which said charges were as follows:

"15. If you believe the evidence in this case you cannot find a verdict for the plaintiff for more than the sum of fifty dollars, together with interest thereon."

"16. I charge you as a matter of law that the telegraph message described in the complaint was valued by the plaintiff at the sum of fifty dollars at the time the message was offered by him to the defendant for transmission, and that the plaintiff not having valued said message at a higher sum than fifty dollars at said time and paid the higher rate required for the transmission of a message valued at more than fifty dollars, he is now estopped to claim that his damages in this case are more than said sum of fifty dollars, with interest thereon."

"17. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, the provisions

of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), the liability of the defendant telegraph company was limited to the sum of fifty dollars with interest thereon, at which said sum said message was valued at the time it was offered to the defendant for tranmission, regardless of whether or not the error made in the transmission of said message was due to simple negligence, or gross negligence on the part of the defendant, its servants, agents or employees."

"18. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, and the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), the liabiilty of the defendant telegraph company was limited to the sum of fifty dollars with interest thereon, at which said sum said message was valued at the time it was offered to the defendant for transmission, regardless of whether or not the error made in the transmission of said message was due to simple negligence or gross negligence on the part of the defendant, its servants, agents or employees."

"19. I charge you as a matter of law that the telegraphic message involved in this suit was an interstate message; that under the provisions of Article I, section 8, subdivision 3, of the Constitution of the United States, the provisions of the Act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539), and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County

Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), the liability of the defendant telegraph company to the plaintiff in this case for the error made in the transmission of said message is limited to the sum of fifty dollars with interest thereon."

"20. Under the undisputed evidence in this case the jury cannot render a verdict for the plaintiff for more than fifty dollars with interest thereon at the rate of eight per cent per annum from the time of the accrual of plaintiff's cause of action to the date of trial."

"21. The plaintiff cannot recover more than the amount paid for the transmission of the telegram with interest thereon, unless the jury should find from all the evidence in the case that some operator of the company either wilfully or with such reckless and wanton disregard of the consequences as to amount to the same thing changed or caused to be changed the word fifty to fifteen. If the change from fifty to fifteen resulted from mere inadvertence the plaintiff under the law can only recover the amount paid for the transmission with interest thereon."

"22. If the jury find from the evidence that the change of the word fifty to fifteen was a mere mistake or error such as may happen at times to skilled men in the exercise of that degree of diligence and attention which careful and prudent men apply to affairs of importance the plaintiff cannot recover."

And to the action of the Court in refusing to give said written charges separately and severally the defendant duly and legally excepted.

The jury returned a verdict for the plaintiff and against the defendant for $514.07, and judgment was entered ac-

cordingly. Thereupon and on, towit: the 30th day of September, 1925, the defendant made a motion for a new trial, which was in words and figures as follows:

MOTION FOR NEW TRIAL.

"Now comes the defendant, the Western Union Telegraph Company, by its attorneys, and moves the Court to set aside the verdict of the jury rendered in said cause on the 29th day of September, 1925, and the judgment entered on said verdict, and to grant to defendant a new trial on the following grounds:

(1) Because said verdict is contrary to the evidence.

(2) Because said verdict is contrary to the great weight of the evidence.

(3) Because said verdict is contrary to law.

(4) Because under the great weight of the evidence the jury was unauthorized to find that the defendant, or its servants, agents or employees, were guilty of gross negligence or wilful misconduct in and about the tranmission or delivery of the telegraphic message described in the complaint.

(5) Because the Court erred in failing to give to the jury separately and severally written charges requested by the defendant numbered 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22.

(6) Because under Article I, section 8, subdivision 3, of the Constitution of the United States, the act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539) and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra,

partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), the liability of the defendant telegraph company to the plaintiff was limited to the amount paid for the transmission and delivery of said message with interest thereon, regardless of whether or not the error made in the transmission of said message was due to simple negligence or gross negligence on the part of the defendant, its servants, agents or employees, and the Court erred in permitting the jury to return a verdict for the plaintiff if they believed that the error was caused by gross negligence on the part of the defendant, its servants, agents or employees.

(7) Because under Article I, section 8, subdivision 3, of the Constitution of the United States, the act of Congress to regulate commerce as amended June 18, 1910 (36 Statutes at Large 539) and the decision of the Interstate Commerce Commission in the case of J. L. Cultra and Myrtle Cultra, partners trading as Clay County Produce Company, against the Western Union Telegraph Company (44 I. C. C. 670), the liability of the defendant telegraph company to the plaintiff was limited to the sum of fifty dollars with interest thereon, at which said sum the message described in the complaint was valued by the plaintiff at the time it was offered to the defendant for transmission, and the Court erred in permitting the jury to find a verdict for the plaintiff for more than the sum of fifty dollars with interest thereon.

RUSHTON, CRENSHAW & RUSHTON,
Attorneys for Defendant.

To: C. H. Priester or Powell & Hamilton, his Attorneys of Record:

Said motion for a new trial came on for hearing on the 3rd day of October, 1925, and on a hearing of said motion

the defendant introduced all of the evidence heard on the trial of the cause, but the Court after considering said testimony overruled said motion for a new trial, and the judgment and decision of the Court overruling said motion for a new trial is in words and figures as follows, to-wit:

October 3rd, 1925. Came the parties by their attorneys and defendant submits to the Court its motion for a new trial, which said motion is submitted upon the testimony adduced on the trial and the charges and matters referred to in the motion and said motion being argued and in all things understood by the Court.

It is therefore considered and adjudged by the Court that said motion for a new trial be, and the same is overruled and to this action of the Court the defendant excepts.

To said action of the Court in overruling the motion for a new trial the defendant then and there duly and legally excepted.

WHEREFORE, defendant tenders this its bill of exceptions in said cause within the time allowed by law.

TENDERED this 28th day of October, 1925.

A. E. GAMBLE, Judge.

APPROVED this 5th day of December, 1925.

A. E. GAMBLE, Judge.

Filed December 5th, 1925.

## APPEAL BOND TO COURT OF APPEALS

STATE OF ALABAMA,
MONTGOMERY COUNTY.

CIRCUIT COURT OF BUTLER COUNTY.

KNOW ALL MEN BY THESE PRESENTS, That we, Western Union Telegraph Company, a corporation and American Surety Company, a corporation, are held and firmly bound unto C. H. Priester in the sum of One thousand and fifty dollars, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, executors and administrators, jointly, severally and firmly by these presents, and as part of this undertaking we hereby waive all our rights under the Constitution and Laws of the State of Alabama, to have any of our property, real or personal, exempt from levy and sale in satisfaction hereof.

Sealed with our seals, and dated.....day of November, 1925.

WHEREAS, at the Fall Term, 1925, of the Circuit Court of Butler of and for said County, on, to-wit: the 29th day of September, 1925, the said C. H. Priester recovered a judgment in said Court against the Western Union Telegraph Company for the sum of Five Hundred and Fourteen and 07|100 Dollars, debt and damages, and the further sum of .....Dollars, the cost in that behalf expended; and whereas, on this day the said Western Union Telegraph Company as such defendant, has made application for an appeal from said judgment to the next term of the Court of Appeals, to be holden of and for said State, to reverse said judgment, and also for a supersedeas of the execution of said judgment, which has been granted on entering into this bond.

Now, Therefore, the condition of the foregoing obligation is such, that if the said Western Union Telegraph Company shall prosecute its said appeal to effect, and satisfy such judgment as the Court of Appeals may render in this case, then the said obligation to be null and void, otherwise to remain in full force and effect.

The Western Union Telegraph Company (L. S.)
by H. F. Crenshaw, its atty, in fact (L. S.)
American Surety Co. of N. Y. (L. S.)
By C. P. Gunter, Atty. in fact, (L. S.)
Ludlow Elmore, Countersigned.

(SEAL)

APPROVED:

November 28th, 1925.

C. C. May, Clerk.

Filed November 28th, 1925.

## CITATION OF APPEAL.

To C. H. Priester, or Powell and Hamilton, his attorneys of Record—Greeting:

Whereas, Western Union Telegraph Company, a corporation, has taken an appeal from a judgment rendered by the Circuit Court of Butler County, Alabama, in the Second Judicial Circuit on the 29th day of September, 1925, in the cause of C. H. Priester, Plaintiff, against Western Union Telegraph Company, a corporation, Defendant, to Court of Appeals of Alabama.

Now you are, therefore, cited to appear at the Next Term of the Court of Appeals of Alabama, to defend on said appeal if you shall think proper so to do.

Witness, this 8th day of December, 1925.

C. C. May,
Clerk of the Circuit Court of
Butler County, Alabama.

Powell and Hamilton, attorneys of Record for plaintiff, hereby accept service of said citation this the 8th day of December, 1925.

C. C. May, Clerk.

---

IN THE COURT OF APPEALS OF ALABAMA

October Term, 1925.

3rd Div. No.....

WESTERN UNION TELEGRAPH COMPANY

v.

C. H. PRIESTER

---

Now comes the Appellant and says that in the record and proceedings in the Court below the Trial Court erred to its manifest harm and detriment, and as grounds of such error it assigns the following:

(1) The Court erred in sustaining the plaintiff's demurrer to defendant's plea (2) to count (6) of the complaint. (Rec., pp. 16, 30.)

(2) The Court erred in sustaining the plaintiff's demurrer to defendant's plea (2) to count (7) of the complaint. (Rec., pp. 16, 30.)

(3) The Court erred in sustaining the plaintiff's demurrer to defendant's plea (3) to count (6) of the complaint. (Rec., pp. 16, 30.)

(4) The Court erred in sustaining the plaintiff's demurrer to defendant's plea (3) to count (7) of the complaint. (Rec., pp. 16, 30.)

(5) The Court erred in sustaining the plaintiff's demurrer to defendant's plea (4) to count (6) of the complaint. (Rec., pp. 16, 30.)

(6) The Court erred in sustaining the plaintiff's demurrer to defendant's plea (4) to count (7) of the complaint. (Rec., pp. 16, 30.)

(7) The Court erred in sustaining the plaintiff's demurrer to defendant's plea (5) to count (6) of the complaint. (Rec., pp. 16, 30.)

(8) The Court erred in sustaining the plaintiff's demurrer to defendant's plea (5) to count (7) of the complaint. (Rec., pp. 30, 21.)

(9) The Court erred in refusing to permit the defendant to introduce the report and order of the Interstate Commerce Commission in the case of Cultra v. Western Union Telegraph Company. (Rec., p. 65.)

(10) The Court erred in refusing to give written charge (3) requested by the defendant. (Rec., pp. 26, 77.)

(11) The Court erred in refusing to give written charge (4) requested by the defendant. (Rec., pp. 26, 77.)

(12) The Court erred in refusing to give written charge (6) requested by the defendant. (Rec., pp. 26, 77.)

(13) The Court erred in refusing to give written charge (7) requested by the defendant. (Rec., pp. 26, 77.)

(14) The Court erred in refusing to give written charge (8) requested by the defendant. (Rec. ,pp. 26, 77.)

(15) The Court erred in refusing to give written charge (9) requested by the defendant. (Rec., pp. 26, 77.)

(16) The Court erred in refusing to give written charge (10) requested by the defendant. (Rec., pp. 26, 77.)

(17) The Court erred in refusing to give written charge (11) requested by the defendant. (Rec., pp. 27, 77.)

(18) The Court erred in refusing to give written charge (12) requested by the defendant. (Rec., pp. 27, 78.)

(19) The Court erred in refusing to give written charge (13) requested by the defendant. (Rec., pp. 27, 78.)

(20) The Court erred in refusing to give written charge (14) requested by the defendant. (Rec., pp. 28, 78.)

(21) The Court erred in refusing to give written charge (15) requested by the defendant. (Rec., pp. 28, 79.)

(22) The Court erred in refusing to give written charge (16) requested by the defendant. (Rec., pp. 28, 79.)

(23) The Court erred in refusing to give written charge (17) requested by the defendant. (Rec., pp. 28, 79.)

(24) The Court erred in refusing to give written charge (18) requested by the defendant. (Rec., pp. 29, 79.)

(25) The Court erred in refusing to give written charge (19) requested by the defendant. (Rec., pp. 29, 80.)

(26) The Court erred in refusing to give written charge (20) requested by the defendant. (Rec., pp. 29, 80.)

(29) The Court erred in overruling the defendant's motion for a new trial. (Rec., pp. 31, 81, 82.)

FRANCIS R. STARK,
RUSHTON, CRENSHAW & RUSHTON,
Attorneys for Appellant.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT.

THE ALABAMA COURT OF APPEALS
OCTOBER TERM, 1926-27.

3 Div. 532.

Western Union Telegraph Company

v.

C. H. Priester.

Appeal from Butler Circuit Court.

Action for gross negligence in transmitting a telegram. From a judgment for plaintiff defendant appeals.

SAMFORD, J.

The first appeal in this case is to be found in 18 Ala. App. 531. *Western Union Telegraph Company v. Priester.* The second appeal is *Priester v. Western Union Telegraph*

*Company*, 20 Ala. App. 388, and *Ex Parte Priester*, 212 Ala. 271. The statement of the case and the statement of facts in the foregoing cited adjudications are here adopted so far as the same are applicable to this decision. The facts as disclosed by this record are substantially the same as in *Priester v. W. U. Tel. Co.*, 20 Ala. App. 388 and *Ex parte Priester*, 212 Ala. 271. The issues here presented arise on an amended complaint which is now confined to counts 6 and 7 charging defendant with gross negligence and defendant's plea of not guilty.

Exhaustive briefs have been filed by counsel, but however much we might be tempted to enter into a full discussion of the many cited authorities, we feel that the case of *Ex parte Priester, supra*, is conclusive of every question involved in this appeal, so far as this court is concerned.

As we read *Ex parte Priester*, the Supreme Court holds: Notwithstanding the control of telegraph companies doing an interstate business has by the laws of Congress been conferred on the Interstate Commerce Commission a telegraph company transmitting an interstate message, cannot contract against the gross negligence of its employers in transmitting such message. It is a familiar rule that a party will not be permitted to contract against its own gross negligence and the Supreme Court in this case has done no more than to reaffirm a doctrine, as old as the law itself and to declare that the Supreme Court of the United States in its many decisions, has not abrogated the rule. The opinion in *Ex parte Priester* being the law of this case the trial court did not err in its various rulings on the pleadings, the admission of evidence, the refusal of requested written charges and the submission of the case to the jury on the facts.

Let the judgment be affirmed.
AFFIRMED.

STATE OF ALABAMA,

JUDICIAL DEPARTMENT

Tuesday Oct. 26, 1926.

Court of Appeals of Alabama.

Present: Presiding Judge Bricken and Associate Judges Samford and Rice.

3—Div. 532.

BUTLER CIRCUIT COURT

Western Union Telegraph Co.,

v.

C. H. Priester.

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant, and American Surety Co. of New York, sureties on the appeal bond, pay the judgment of the Circuit Court, ten per cent damages thereon and interest and the costs of appeal of this Court and of the Circuit Court.

IN THE COURT OF APPEALS OF ALABAMA.

3 Div. 532.

---

WESTERN UNION TELEGRAPH COMPANY,

*Appellant,*

v.

C. H. PRIESTER, *Appellee.*

---

APPEAL FROM BUTLER CIRCUIT COURT.

---

APPLICATION FOR REHEARING.

---

Now comes the Appellant and moves the Court to set aside the judgment rendered herein on the 26th day of October, 1926, affirming the judgment of the lower court, and to grant Appellant a rehearing and upon such rehearing to reverse the judgment of the lower court. In support of said motion, the Appellant submits the following argument.

FRANCIS R. STARK,
RUSHTON, CRENSHAW & RUSHTON,
Attorneys for Movant.

## BRIEF AND ARGUMENT.

We respectfully submit that the Court in its opinion in this case fell into error in three respects:

1. In holding that the defendant could be held liable for more than the amount paid for sending the message with interest.

2. In holding that the facts were sufficient to go to the jury on the issue of gross negligence.

3. In holding that the plaintiff under any circumstances was entitled to recover more than $50.00 and interest.

### I.

The message on which the suit is based was an interstate message and the liability of the defendant is measured and governed by the rules of liability laid down by the Federal statutes and the decisions of the United States Supreme Court. The message was an unrepeated message and this classification has been expressly approved by the Act of 1910 and by the Interstate Commerce Commission. Under the contract between the parties, liability for default in the transmission or delivery of an unrepeated message was limited to the amount paid for the message. This liability of the company for default is law fixed. Neither the parties to the contract nor the courts for them can vary either the rates or the liability.

The above principles are firmly fixed by the decisions of the United States Supreme Court.

*Postal Tel.-Cable Co. v. Warren-Godwin Lbr. Co.*, 251 U. S. 24;
*Western Union Tel. Co. v. Czizek*, 264 U. S. 481;
*Dickerson v. Western Union Tel. Co.*, 114 Miss. 115;
See also *Cultra v. Western Union Tel. Co.*, 44 I. C. C. Rep. 670.

The above decisions of the United States Supreme Court are controlling on this court and we submit that this court is in error in not holding that under the contract made by the law for the parties when the message was sent as an unrepeated message that the defendant could not be held liable from the amount of tolls with interest.

## II.

We realize that on the question as to whether or not there was sufficient testimony in the case to permit the jury to draw an inference that the employees of the Telegraph Company handled the message were guilty of gross negligence, this Court feels that it is bound by the former opinion of the Supreme Court. We also realize that it is the opinion of this Court that the testimony was not sufficient to justify an inference of gross negligence. We insist, however, that under the authorities cited in our original brief the facts in the case in no event can justify more than an inference of simple negligence and not that degree of negligence which is denominated as gross and which the Supreme Court has held in former opinions to be synonymous with willfulness or wantonness. There is little we can add to what we said in our original brief on this point, but we reiterate and affirm that this Court is right and the Supreme Court wrong in the opinion that the facts shown, in no event could justify a finding of gross negligence.

## III.

We respectfully but firmly insist that this Court fell into serious error in not sustaining those assignments of error directed to the proposition that in no event could the plaintiff recover more than $50.00 with interest. (Assignments of error 3, 4, 7, 8, 11, 13, 21, 22, 23, 24, 25 and 26.)

This question was not before the Supreme Court on the original appeal. It has therefore never been passed upon either by this Court or the Supreme Court.

In the case of *Western Union Telegraph Company v. Czizek*, 264 U. S. 281, the Supreme Court of the United States in unmistakable and positive terms held the stipulation limiting recovery in any event to the sum of $50.00 is valid and binding upon everyone connected with the message. The Court said:

> "One such self-protection sanctioned by the decisions is a valuation of the message with liberty to the sender to fix a higher value on paying more for it. The plaintiff finds no difficulty in valuing the message now. It was at least equally possible to value it when it was sent. When the message is valued it may be doubted whether the valuation can be affected by the intensity of the vituperative epithet applied to an admitted fault. * * * With regard to the amount of the valuation, if it is too low now, it was reasonable in 1917."

The holding of the Supreme Court of the United States in the Czizek case, therefore, is direct authority that the $50.00 valuation clause is valid and binding even as against gross negligence as that was a case where gross negligence had been found by the lower court and we cannot see how this Court, in the face of that case, can hold that the lower court did not err in limiting recovery in any event to the sum of $50.00 with interest.

## CONCLUSION

We respectfully submit that upon a re-consideration of the issues as shown by the record and especially the assignments of error directed to the effect of the $50.00 stipulation, this Court should reverse the judgment of the lower court and remand the cause for further proceedings.

Respectfully submitted,

FRANCIS R. STARK,
RUSHTON, CRENSHAW & RUSHTON,
Attorneys for Appellant.

This is to certify that a copy of the foregoing application and brief has this day been mailed, postage prepaid, to Messrs. Powell & Hamilton, Counsel for Appellee, at Greenville, Ala.

This the 3rd day of November, 1926.

H. F. CRENSHAW,
Of Counsel for Appellant.

Filed Court of Appeals of Alabama, Nov. 4, 1926.
ALEX TROY, Clerk.

Court of Appeals of Alabama, Nov. 9, 1926.

Present: Bricken, Presiding Judge, and Samford and Rice, Associate Judges.

*Western Union Telegraph Co. v. C. H. Priester.*
Application for rehearing overruled.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE COURT OF APPEALS OF ALABAMA

3rd Div., No. 532.
Western Union Telegraph Co., Appellant,
v.
C. H. Priester, Appellee.
From Butler County Circuit Court.
The State of Alabama,
City and County of Montgomery.

I, Alexander Troy, Clerk of the Court of Appeals, do hereby certify that the foregoing pages numbered from 3 to 129 inclusive, contain a full, true and correct copy of the record and proceedings, assignments of error, opinion and judgment of the said Court of Appeals application for rehearing and order overruling same in the above stated cause, as the same appears and remains of record and on file in this office. I further certify that said cause was argued and submitted in said Court of Appeals on the 17th day of December, 1925, that on the 26th day of October, 1926, said Court of Appeals rendered a judgment affirming the judgment of the Circuit Court of Butler County, Alabama, that the appellant, Western Union Telegraph Company, on the 4th day of November, 1926, duly filed an application for rehearing in said Court of Appeals, which said application for rehearing was overruled by said court on the 9th day of November, 1926.

Witness, Alexander Troy, Clerk of the Court of Appeals of Alabama, at the Capitol, this the .....day of..... 1927.

Alexander Troy,
Clerk of the Court of Appeals of Alabama.

IN THE SUPREME COURT OF ALABAMA.

Ex parte Western Union Telegraph Co.

In Re:

Western Union Tel. Co.

v.

C. H. Priester.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of Alabama:

Your petitioner, the Western Union Telegraph Company, a Corporation, hereby respectfully petitions this Honorable Court to review and determine the decision rendered by the Court of Appeals of Alabama on the 26th day of October, 1926, in that certain appeal in that Court numbered and styled "3 Div. 532, *Western Union Telegraph Company, Appellant, v. C. H. Priester, Appellee,*" on appeal from the Butler County Circuit Court. Petitioner avers that it has duly filed its application for rehearing in said Court of Appeals in said cause within the time required by law and raising the points hereinafter set forth, and that said application for rehearing was overruled by said Court of Appeals on the 9th day of November, 1926.

Your petitioner respectfully shows unto the Court that this cause is a suit for damages by C. H. Priester against the petitioner based upon an error made in the transmission of a telegraphic message sent by C. H. Priester over the wires of the petitioner on the 16th day of December, 1919, to J. K. Lewis, 411 Poydras Street, New Orleans, La., reading: "I offer you one thousand or fifteen hundred pounds Frotcher pecans at fifty cents F. O. B. Fort Deposit. An-

swer. (Signed) C. H. Priester", claiming that in the transmission of said message the word "fifty" was changed to "fifteen."

This case was tried upon two counts of the complaint numbered 6 and 7, which counts of the complaint alleged that the error made in the transmission of the message was due to gross negligence on the part of the servants, agents or employees of the defendant telegraph company, while acting in the line or scope of their authority. To these counts of the complaint, the defendant filed a plea of the general issue and four special pleas.

Plea number 2 avers that the message was an interstate message; that by the Act of June 18, 1910, Congress had entered upon and assumed charge of the regulating of the field of interstate communication by telegram and had approved the classification of messages into, among other classifications, repeated and unrepeated messages; that the message on which the suit was based was an unrepeated message and under the defendant's rules, regulations and tariffs as they were on file with the Interstate Commerce Commission at the time of the sending of the message, the defendant's liability was limited to the price paid for sending the message.

Plea number 3 also avers the interstate nature of the message and that among other rules and regulations of the defendant on file with the Interstate Commerce Commission at the time of the delivery and transmission of the message sued on, was one limiting the liability of the defendant for mistakes or delays in the transmission or delivery of messages, whether caused by the negligence of its servants or otherwise, to the sum of $50.00, at which amount telegraphic messages were valued unless specially valued at a greater sum at the time the message was offer-

ed to the company for its transmission and an additional sum paid based on such value. The plea avers that the message on which the suit was based was not valued at any greater sum than $50.00 and no additional sum was paid or agreed to be paid based on such value.

Plea number 4 avers the interstate character of the message and the unrepeated message stipulation in practically the same words as plea number 2 and further avers that the plaintiff having paid the lower rate charged for the transmission and delivery of an unrepeated message from Fort Deposit, Alabama, to New Orleans, La., as a part of which rate the liability of the telegraph company for mistakes or delays was limited to the amount for sending the message, was estopped to claim that his damages exceeded the amount paid for sending the message with interest.

Plea 5 is in practically the same words as plea 3, setting up the interstate nature of the telegram and the valuation clause, and further avers that the message was not sent as a valued message; that the pltaintiff having paid the rate charged for the transmission and delivery of a message from Fort Deposit, Alabama, to New Orleans, La., based upon a valuation of $50.00 as a part of which rate the liability of the defendant for mistakes or delays was limited to the sum of $50.00, was estopped to claim that his damages exceeded the said sum with interest.

Plaintiff's demurrers to special pleas 2, 3, 4 and 5, as answers to the counts charging gross negligence, were sustained.

The facts in the case were without dispute. On the date the message was sent, to-wit, December 16, 1919, the Western Union Telegraph Company did not maintain an office at Fort Deposit, Alabama. Telegraph messages were sent

from Fort Deposit over long distance telephone to the Western Union operator at Greenville, Alabama, and this method of sending telegraph messages had been the custom for many years. On December 16, 1919, the plaintiff, C. H. Priester, went to the office of the Southern Bell Telephone Company at Fort Deposit and told the telephone operator the substance of a message which he wished to send to J. K. Lewis, at New Orleans. The telephone operator wrote the message down on the back of a letter and telephoned it to the Western Union Telegraph operator at Greenville who repeated the message back to the operator at Fort Deposit. The telegraph operator at Greenville informed the telephone operator at Fort Deposit the amount of the toll for sending the message, 80 cents, which amount was collected by the telephone operator at Fort Deposit and afterwards accounted for to the telegraph company. The 80 cents paid for sending the message was the ordinary charge for the transmission and delivery of unrepeated messages of that number of words from Greenville to New Orleans. The message was not sent as a repeated or as a specially valued message. The telegraph operator at Greenville wrote the message down on one of the regular sending blanks of the Telegraph Company which contained on the reverse thereof the stipulations of the Telegraph Company as to the repeated, unrepeated and valued messages as set forth in defendant's special pleas. The message as sent from Greenville read: "I offer you one thousand or fifteen hundred pounds Frotcher pecans at fifty cents F. O. B. Fort Deposit. Answer. C. H. PRIESTER." It was sent correctly over the wires from Greenville to New Orleans where it was received at the main office of the Telegraph Company there. It was written out on one of the regular receiving blanks of the company and the message then sent by underground tube from the main office to the Cotton Exchange Branch of the Telegraph office on the corner of Gravier and St. Charles Streets.

The Western Union Telegraph Company in order to expedite delivery of messages to its customers, maintains a number of branch offices in the downtown section of New Orleans. The place of business of the addressee of the message, J. K. Lewis, 411 Poydras Street, was about three blocks from a branch office of the Telegraph Company known as the Board of Trade Office located on the corner of Gravier Street and Natchez Alley. The message was sent over the wires of the Telegraph Company from the Cotton Exchange Branch to the Board of Trade Branch, which was the branch office serving the territory in which the office of the addressee of the message was located. The operator who sent the message over the wires from the Cotton Exchange Branch testified that he transmitted the message correctly and the operator who received it at the Board of Trade Branch Office testified that he wrote it down as he understood it to come over the wires. As written out by the receiving operator at the Board of Trade Branch Office, it read: "J. K. Lewis, New Orleans, La. Offer you one thousand or fifteen hundred pounds Frothiers at fifteen cents F. O. B. Deposit. Answer. C. H. PRIESTER." Upon receipt of the message by J. K. Lewis, he telegraphed Mr. Priester as follows: "Will take fifteen hundred pounds of pecans offered to-day or to-morrow expense shipment." The plaintiff shipped to Lewis at New Orleans 1006 pounds of pecans and received pay therefor at the rate of 15 cents per pound instead of 50 cents per pound as offered in the message delivered by Priester to the telephone operator at Fort Deposit.

Both of the operators of the company who handled the message at the Cotton Exchange Branch and the Board of Trade Branch at New Orleans testified that they did not know any of the parties to the message and had no feeling of anger, ill-will or anything of that kind towards any of them.

Defendant offered in evidence a certified copy by the secretary of the Interstate Commerce Commission under the seal of said Commission of the rules and regulations of the Western Union Telegraph Company as they were on file with the Interstate Commerce Commission on December 16, 1919, which said rules and regulations contained the stipulations as to unrepeated, repeated and valued messages as set forth in the defendant's special pleas.

The defendant then offered to introduce in evidence the report and order of the Interstate Commerce Commission in what is known as the Unrepeated Message case, entitled J. L. Cultra and Myrtle Cultra, partners trading as the Clay County Produce Company, against the Western Union Telegraph Company, set forth on pages 54-65 of the record. Plaintiff objected to the introduction of said certified copy of said report and order because it was illegal and irrelevant and because it was the decision of another court in another case and not applicable to the case at bar. Upon the Court making known that it would sustain the objection to the introduction of said certified copy of said report and decision of the Interstate Commerce Commission in said case, the defendant made known to the Court that said order of the Interstate Commerce Commission in said cause was offered for the purpose of showing that the interstate Commerce Commission had recognized to be valid and binding the stipulations and provisions written on the back of the message sent by the plaintiff in this case, and had further recognized and held to be binding and valid the classifications of messages into repeated and unrepeated messages, as shown by the stipulations on the back of the message sent by plaintiff in this case; and further that said order was offered for the purpose of showing that the Interstate Commerce Commission had recognized and held to be valid and binding the regulations of the telegraph company limiting the valuation of messages not specially val-

ued at the time they are offered to the Company for transmission at not more than fifty dollars. The Court sustained the objection of the plaintiff to the introduction of the order of the Interstate Commerce Commission, and the defendant duly excepted.

The court submitted the case to the jury on the issue of gross negligence on the part of the defendant in and about the transmission of the message charging the jury that if the agent of the defendant did not bestow the care and skill which the situation demanded they should bestow, the plaintiff could recover.

The defendant requested the Court to give to the jury certain charges in writing, one instructing them that if they believed the evidence they could not return a verdict for the plaintiff, and also one that they could not return a verdict for more than the amount paid for the message with interest thereon. Other charges to the jury were requested in writing to the effect that a message having been sent as an unrepeated message under the provisions of the Act of Congress to regulate commerce the liabiilty of the defendant was limited to the amount paid for transmitting the message with interest thereon.

Upon the Court's refusing to give these charges, the defendant thereupon requested the Court in writing, to charge the jury that if they believed the evidence they could not find for the plaintiff for more than the sum of fifty dollars with interest thereon; also one that plaintiff having sent the message valued at fifty dollars he was estopped to claim more than that amount as his damages, and that under the Federal law and decisions applicable to interstate communication by telegraph the liability of the defendant was limited to the sum of fifty dollars with interest.

The Court refused all of the written charges requested by the defendant. The jury returned a verdict for the plaintiff for $514.07 and judgment was entered accordingly.

The defendant made a motion for a new trial, again raising the defenses that under the Act of June 18, 1910, amending the Interstate Commerce Act, and the decisions of the Interstate Commerce Commission the liability of the defendant was limited to the amount paid for sending the message with interest, and also limited to the sum of fifty dollars with interest thereon, at which the message had been valued by the plaintiff. The Court overruled this motion for a new trial and exception was duly taken by the defendant.

The Court of Appeals in its decision in the case affirming the judgment of the lower court felt that it was bound by the opinion of this Court in the case of Ex Parte Priester, 212 Ala. 271, and so stated.

Your petitioner respectfully submits unto Your Honors that the said decision of the Court of Appeals of Alabama and the judgment of said court is erroneous in this:

I.

The Court of Appeals erred in sustaining the action of the lower court in permitting plaintiff to recover more than the the amount paid for sending the message with interest, because under Article One, Section Eight, Subdivision Three of the Constitution of the United States, the act of Congress to Regulate Commerce as amended June 18, 1910, (36 Statutes at Large, 539) and the decisions of the United States Supreme Court in the cases of *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 54

Law Ed. 118; *Western Union Telegraph Co. v. Boegli*, 251 U. S. 315, 64 Law Ed. 281; *Western Union Telegraph Co. v. Esteve Brothers*, 256 U. S. 566, 65 Law Ed. 1099, the liability of the defendant telegraph company to the plaintiff was limited to the amount paid for the transmission and delivery of said message with interest thereon, regardless of whether or not the error made in the transmission of said message was due to simple negligence or gross negligence on the part of the defendant, its servants, agents or employees. (Assignments of Error numbers 1, 2, 5. 6, 9, 12, 13, 17, 18, 19, 20, 29.)

II.

The Court of Appeals erred in upholding the action of the trial court in submitting to the jury the issue as to whether or not under the evidence the servants, agents or employees of the defendant telegraph company were guilty of gross negligence, because the telegraphic message being an interstate message, the liability of the Telegraph Company is determined by the rules of law announced by the United States Supreme Court and under the decision of the Supreme Court of the United States in the case of *Primrose v. Western Union Telegraph Company*, 154 U. S. 1, 38 Law Ed. 883, mere inadvertence or inattention does not constitute gross negligence.

(Assignments of Error numbers 10, 11, 14, 15, 29.)

III.

The Court of Appeals erred in sustaining the rulings of the trial court in permitting plaintiff to recover more than the sum of $50.00, with interest, at which sum the said message had been valued by plaintiff, because under Article One, Section Eight, Sub-division Three of the Con-

stitution of the United States, the act of Congress to regulate commerce, as amended June 18, 1910 (36 Statutes at Large, 539) and the decisions of the United States Supreme Court in the cases of *Postal Telegraph-Cable Co. v. Dickerson*, 254 U. S. 609, 65 Law Ed. 436; and *Western Union Telegraph Co. v. Czizek*, 264 U. S. 281, 68 Law Ed. 682, the liability of the defendant telegraph company to the plaintiff was limited in all events to the sum of $50.00, with interest thereon, at which sum the message as described in the complaint was valued by the plaintiff at the time it was offered to the defendant for transmission.

(Assignments of Error numbers 3, 4, 7, 8, 21, 22, 23, 24, 25, 26, 29).

IV.

The Court of Appeals erred in not granting appellant's application for rehearing.

WHEREFORE, your petitioner most respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court on a day certain to be designated by this Court, a full and complete transcript of the record and all proceedings of said Court of Appeals of Alabama, in the cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of, and to reverse the judgment of the Court of Appeals, or render such judgment as said Court should have rendered. Petitioner prays that this Honorable Court suggest and require the Court of Appeals to stay or recall its certificate of judgment or affirm-

ance of said cause during the pendency of this petition. And petitioner prays for such other, further and additional relief in the premises as to this Court may seem appropriate, and to which it may be entitled, and your petitioner will ever pray, etc.

Respectfully submitted,

FRANCIS R. STARK,
RUSHTON, CRENSHAW & RUSHTON,
Attorneys for Petitioner.

STATE OF ALABAMA,
MONTGOMERY COUNTY.

Before me, J. C. Crenshaw, a notary public, in and for said county in said state, personally appeared H. F. Crenshaw, who, being duly sworn, deposes and says that he is one of the attorneys for the petitioner, The Western Union Telegraph Company, and that the recitals of the foregoing petition are true to the best of his knowledge, information and belief.

H. F. Crenshaw,

Subscribed and sworn to before me this 22 day of November, 1926.

J. C. Crenshaw,
Notary Public.

We hereby certify that we have given the attorneys of record for appellee in this cause notice of the filing of this petition, this the 19th day of November, 1926.

Ray Rushton,
Attorneys for Petitioner.

STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

Monday, Nov. 22, 1926.

PRESENT:

3 Div. 783. Chief Justice Anderson, and Associate Justices: Sayre, Gardner and Miller.

Ex Parte:

Western Union Telegraph Company.

In Re:

Western Union Telegraph Company

Vs.

C. H. Priester.

Comes the petitioner, Western Union Telegraph Company, by attorneys, and files in this Court a petition for the writ of Certiorari to the Court of Appeals of Alabama, in the case of Western Union Telegraph Company vs. C. H. Priester, and submits said petition on briefs for decision.

STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA.

Thursday, Jan. 13th, 1927.

PRESENT:

Chief Justice Anderson and Associate Justices: Sayre, Gardner and Miller:

Ex Parte:

Western Union Telegraph Co.

In Re: PETITION FOR CERTIORARI TO COURT OF APPEALS.

Western Union Telegraph Co.

3 Div. 783. Vs.

C. H. Priester.

Comes the petitioner by attorneys, and the petition for the writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court, it is considered that said petition be and the same is hereby denied at the cost of the petitioner.

THE STATE OF ALABAMA,
CITY AND COUNTY OF MONTGOMERY.

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages numbered from 13b to 148 inclusive, contain a full, true, and correct copy of the record and proceedings of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, this the_____day of February, 1927.

(Seal)

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1926

No. 916

ORDER ALLOWING CERTIORARI—Filed April 18, 1927

The petition herein for a writ of certiorari to the ~~Supreme~~ Appeals of Court of the State of Alabama is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

April 18, 1927.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1926

No. 958

ORDER ALLOWING CERTIORARI—Filed April 18, 1927

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

April 18, 1927.

# IN THE SUPREME COURT OF THE UNITED STATES

October Term 1926-7

---

WESTERN UNION TELEGRAPH COMPANY,
A CORPORATION,
*Petitioner,*

v.

C. H. PRIESTER,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

---

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

This is a petition to review a judgment of the highest Alabama court in which a decision could be had, which in a case concededly governed by the Federal law, has refused to follow and apply a recent, well-considered and controlling decision of this court. The Federal question was raised at the outset and persistently preserved throughout.

In *Western Union* v. *Czizek*, 264 U. S. 281 (1924) the question was presented to this court whether a telegraph company could be held liable for failure of duty in connection with an interstate message beyond the sum at which the message was *valued* by the sender. The circuit court of appeals had held, and the case was argued in this court

by both sides on the theory, that, if it made any difference with respect to the telegraph company's liability beyond the amount of the valuation in such a case whether its negligence had been ordinary or "gross" negligence, the negligence in that case was "gross". There had been a complete failure to transmit the message from the office of origin, and in addition to that the company had mistakenly informed the sender, when he inquired, that the message had been duly sent. This court held that the addition of a vituperative epithet to the admitted fault did not authorize a recovery beyond the amount at which the message was valued.

In the present case, an interstate message was sent under the same message classifications which were applicable in the Czizek case, and, as in the Czizek case, the message was valued by the sender at $50.00. The only fault was a simple error in transmission. There was no evidence and no claim of any wilful wrong. The jury was permitted to find that the negligence was "gross"; and on the strength of this finding the State court has allowed a recovery of the full amount of the loss, which was in excess of the valuation. It has simply refused to follow the controlling decision of this court in the Czizek case.

There is a second question involved. It is the contention of petitioner that since the relations between a telegraph company and the sender of an interstate or foreign message have ceased to be simply relations of contract and have become relations in which the rights and liabilities of the parties are fixed by law (*Western Union Telegraph Company v. Esteve Brothers*, 256 U. S. 566, decided 1921), it is immaterial whether the telegraph company's negligence is "gross" or simple, not only with respect to the provision of the message tariffs limiting recovery to the amount at which the message is valued by the sender, but also with respect to the separate provision of the message

tariffs limiting the liability of the company to a still smaller amount when the message was *unrepeated*. This question was argued in the Czizek case, but not decided by the court, for the reason that, as the court construed the message tariff, the clause limiting the company's liability for unrepeated messages was held not to be intended to apply to a total failure to transmit the message from the point of origin, which was the nature of the default in that case. But in the present case there is no dispute that, if valid, the provision restricting the liability of the defendant for errors in unrepeated messages applies; and it therefore becomes necessary to determine whether the effect of this provision, in a case to which it is clearly applicable, can be avoided by State courts through the simple expedient, every time the question arises, of leaving it to the jury to say whether the negligence resulting in a simple error, admittedly without wilful intent, was "gross".

We believe that the foregoing statement sufficiently shows the importance of the case and the propriety of issuing the writ under the rules which the court has announced as governing its action on these applications. A somewhat more detailed statement of the manner in which the issues were presented and the Federal question raised follows.

The message on which the suit is based was sent by respondent, Priester, from Ft. Deposit, Alabama, to New Orleans, La. Petitioner did not maintain an office at Ft. Deposit and the message was sent over the telephone from Ft. Deposit to Greenville, Alabama, where it was written down by the telegraph operator on one of the regular sending blanks of the company and forwarded over the wires of the petitioner to New Orleans. As sent over the wires of the company from Greenville to New Orleans, the message read as follows:

"Ft. Deposit, Ala. 12-16-1919. J. K. Lewis, 411 Poydras Street, New Orleans, La. Offer you one thousand or fifteen hundred pounds Frotchers pecans at *50c* f. o. b. Ft. Deposit. Answer. C. H. Priester."

The message was correctly transmitted to the main office of petitioner at New Orleans but in relaying it between branch offices maintained by the company to expedite business in the downtown section of New Orleans, it was altered to read:

"J. K. Lewis, N. O. La. Offer you 1000 or 1500 pounds Frothiers at *15 cents* f. o. b. Deposit. Answer. C. H. Priester."

Upon receipt of the message by Lewis, he telegraphed respondent, Priester, that he would take 1500 pounds of pecans offered and in reliance upon such message, respondent Priester shipped to Lewis 1006 pounds of pecans and received pay therefor at the rate of 15c per pound instead of 50c per pound as originally offered by him.

On July 21, 1920, respondent Priester filed suit for damages against petitioner in the circuit court of Butler County, Alabama, the complaint consisting of a single count alleging negligence in the transmission of the telegram. There were three trials of the suit in the circuit court of Butler County, and the pleadings were several times amended. For the purposes of this petition it will suffice to say that the trial as finally had was upon two counts alleging *gross* negligence on the part of the defendant's agents or employes in and about the transmission and delivery of the message and special pleas setting up two separate Federal defenses: (1) The interstate nature of the message; that it was sent as an unrepeated message and under the company's rules, regulations and tariffs on file with the Interstate Commerce Commission the damages were limited to

the amount paid for sending the message; (2) that the message was an interstate message and that under the company's rules, regulations and tariffs on file with the Interstate Commerce Commission at the time of sending the message the company's liability was limited to $50.00 at which the said message had been valued by the sender. The Federal defenses were raised at every stage of the proceeding, including pleas to the original and amended complaints, rulings on pleadings, on the admission of evidence, requested charges and motion for a new trial.

On the last trial the circuit court of Butler County submitted the case to the jury solely on the issue of gross negligence on the part of the petitioner's servants or agents in and about the transmission of the message and charged the jury that if under the evidence the jury should find that the agents of the defendant "did not bestow the care and skill which the situation demanded they should bestow", the plaintiff could recover. The jury returned a verdict for respondent Priester for $514.07 and judgment was entered accordingly. After the trial court had overruled a motion for a new trial, which again raised the Federal defenses, an appeal was taken to the Court of Appeals of Alabama, which court has final jurisdiction of suits at law where the amount involved does not exceed $1,000.00. (Code Alabama 1923, Sec. 7309). The Court of Appeals of Alabama on the 26th day of October, 1926, affirmed the judgment of the circuit court of Butler County. Whereupon, petitioner on the 4th day of November, 1926, filed an application in said Court of Appeals of Alabama for a rehearing, which said petition for a rehearing was denied on the 9th day of November, 1926. Thereupon, petitioner on the 22nd day of November, 1926, filed in the Supreme Court of Alabama, which court under Sec. 140 of the Constitution of Alabama has supervisory power over the Court of Appeals, a petition in strict accordance with rule 44 of the said Su-

preme Court (Code of Alabama, 1923, Volume IV, p. 894) for a writ of certiorari to the Court of Appeals to review and determine the decision rendered by the Court of Appeals in said cause on the 26th day of October, 1926, and in support of said petition for certiorari in the Supreme Court, did file a brief and argument as required by the rules of said court; and on the 13th day of January, 1927, the Supreme Court of Alabama entered an order denying said petition for certiorari, whereupon the decision and judgment of the Court of Appeals of Alabama became absolutely final and petitioner now has no other remedy in the courts of Alabama.

The reasons relied on for the allowance of the writ of certiorari from the Supreme Court of the United States to the Court of Appeals of Alabama are as follows:

1st. The Court of Appeals of Alabama erred in affirming a judgment against petitioner for more than $50.00, based on *gross* negligence on the part of petitioner's agents on account of an error made in the transmission of an interstate telegraphic message not specially valued by the sender, where liability for such default was specially limited to the sum of $50.00 by the company's tariffs and classifications on file with the Interstate Commerce Commission; such decision of the Court of Appeals being in conflict with the decision of this Court in the case of *Western Union Telegraph Company v. Czizek*, 264 U. S. 281.

2nd. The Court of Appeals erred in affirming a judgment against petitioner for more than the toll paid, based on *gross* negligence on the part of petitioner's agents on account of an error made in the transmission of an unrepeated interstate telegraphic message, where liability for such default was limited to the toll paid by the company's tariffs and classifications on file with the Interstate Commerce Commission; such decision of the Court of Appeals

of Alabama being probably not in accord with applicable decisions of this Court.

Your petitioner believes that the aforesaid judgment of the Court of Appeals of Alabama is erroneous and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of the Act of Congress and the rules of this Honorable Court in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding the said Court to certify and send to this Court on a day certain to be designated therein, a full and complete transcript of the record and all proceedings of the said Court of Appeals of Alabama in said case therein entitled *Western Union Telegraph Company, Appellant, v. C. H. Priester, Appellee*, 3rd Division, No. 532, to the end that the said case may be reviewed and etermined by this Court as provided in Judicial Code, Sec. 237 (b) as amended by the Act of February 13, 1925; or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Court of Appeals of Alabama in said case and every part thereof may be reversed by this Honorable Court and your petitioner will ever pray.

FRANCIS R. STARK,

RAY RUSHTON,

*Attorneys for Petitioner.*

STATE OF ALABAMA,
MONTGOMERY COUNTY

Ray Rushton, being duly sworn, deposes and says that he is one of the attorneys for the petitioner in the foregoing petition and has read the same; that he is duly authorized to make this affiadvit on behalf of said petitioner; that the same is true to his own knowledge, information and belief, that his knowledge is derived from the record in the case and from what has taken place in his presence and hearing in the courts in which said action has been heard.

RAY RUSHTON.

Sworn to and subscribed before me this the 19th day of February, 1927.

John P. Kohn Jr.
*Notary Public.*

My commission expires 8th day of November

1930.

I HEREBY CERTIFY that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petiioner should be granted by this Court.

RAY RUSHTON,
*Of Counsel for Petitioner.*

WESTERN UNION TELEGRAPH COMPANY,
*Petitioner,*

v.

C. H. PRIESTER,
*Respondent.*

---

IN THE SUPREME COURT OF THE UNITED STATES.

---

The Clerk will enter our appearance as counsel for the petitioner.

FRANCIS R. STARK,
RAY RUSHTON.

---

WESTERN UNION TELEGRAPH COMPANY,
*Petitioner,*

v.

C. H. PRIESTER,
*Respondent.*

---

IN THE SUPREME COURT OF THE UNITED STATES.

---

I, D. M. Powell of Greenville, Alabama, of counsel for Respondent C. H. Priester, in the above entitled cause and in all its phases, hereby accept full service of the copy of the petition, printed record and supporting brief in said Court and waive all other further notice and consent that the said submission of said petition for certiorari may be made in said Supreme Court.

This the_____day of February, 1927.

D. M. POWELL,
*Of Counsel for Respondent.*

# IN THE
# SUPREME COURT OF THE UNITED STATES

October Term 1926-7

WESTERN UNION TELEGRAPH COMPANY,
A CORPORATION,
*Petitioner,*

v.

C. H. PRIESTER,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

This is a petition for certiorari in the same cause and for the purpose of presenting the same question as the petition in Number 916 submitted herewith. Since that petition was filed there has been published in the Southern Reporter (111 So. 199) a short memorandum handed down by the Supreme Court of Alabama in connection with the denial of certiorari to the Court of Appeals of Alabama as follows:

"Writ denied on authority of *Postal Telegraph Company v. Minderhout*, 195 Ala. 420."

While counsel for petitioner are reasonably satisfied that the writ of certiorari should run from this court to the Court of Appeals of Alabama, nevertheless, because of

some uncertainties which still remain in view of what was said in *Matthews v. Huwe*, 269 U. S. 262, (Adv. Op. U. S. Sup. Ct. 70 L. Ed. 119) it has been thought not improper out of abundant caution to ask at the same time for a writ directed to the Supreme Court of the State of Alabama.

This petition is, therefore, to review the judgment of the Supreme Court of Alabama (Or. 148) denying a writ of certiorari to the Court of Appeals of Alabama which in a case concededly governed by the Federal law, has refused to follow and apply a recent well-considered and controlling decision of this court. The Federal question was raised in the outset and persistently preserved throughout and was insisted on in petitioner's application to the Supreme Court of Alabama.

In *Western Union v. Czizek*, 264 U. S. 281 (1924) the question was presented to this court whether a telegraph company could be held liable for failure of duty in connection with an interstate message beyond the sum at which the message was *valued* by the sender. The circuit court of appeals had held, and the case was argued in this court by both sides on the theory, that, if it made any difference with respect to the telegraph company's liability beyond the amount of the valuation in such a case whether its negligence had been ordinary or "gross" negligence, the negligence in that case was "gross". There had been a complete failure to transmit the message from the office of origin, and in addition to that the company had mistakenly informed the sender, when he inquired, that the message had been duly sent. This court held that the addition of a vituperative epithet to the admitted fault did not authorize a recovery beyond the amount at which the message was valued.

In the present case, an interstate message was sent under the same message classifications which were applica-

ble in the Czizek case, and, as in the Czizek case, the message was valued by the sender at $50.00. The only fault was a simple error in transmission. There was no evidence and no claim of any wilful wrong. The jury was permitted to find that the negligence was "gross"; and on the strength of this finding the State court has allowed a recovery of the full amount of the loss, which was in excess of the valuation. It has simply refused to follow the controlling decision of this court in the Czizek case.

There is a second question involved. It is the contention of petitioner that since the relations between a telegraph company and the sender of an interstate or foreign message have ceased to be simply relations of contract and have become relations in which the rights and liabilities of the parties are fixed by law (*Western Union Telegraph Company v. Esteve Brothers*, 256 U. S. 566, decided 1921), it is immaterial whether the telegraph company's negligence is "gross" or simple, not only with respect to the provision of the message tariffs limiting recovery to the amount at which the message is valued by the sender, but also with respect to the separate provision of the message tariffs limiting the liability of the company to a still smaller amount when the message was *unrepeated*. This question was argued in the Czizek case, but not decided by the court, for the reason that, as the court construed the message tariff, the clause limiting the company's liability for unrepeated messages was held not to apply to a total failure to transmit the message from the point of origin, which was the nature of the default in that case. But in the present case there is no dispute that, if valid, the provision restricting the liability of the defendant for errors in unrepeated messages applies; and it therefore becomes necessary to determine whether the effect of this provision, in a case to which it is clearly applicable, can be avoided by State courts through the simple expedient,

every time the question arises, of leaving it to the jury to say whether the negligence resulting in a simple error, admittedly without wilful intent, was 'gross".

We believe that the foregoing statement sufficiently shows the importance of the case and the propriety of issuing the writ under the rules which the court has announced as governing its action on these applications. A somewhat more detaailed statement of the manner in which the issues were presented and the Federal question raised follows.

The message on which the suit is based was sent by respondent, Priester, from Ft. Deposit, Alabama, to New Orleans, La. Petitioner did not maintain an office at Ft. Deposit and the message was sent over the telephone from Ft. Deposit to Greenville, Alabama, where it was written down by the telegraph operator on one of the regular sending blanks of the company and forwarded over the wires of the petitioner to New Orleans. As sent over the wires of the company from Greenville to New Orleans, the message read as follows:

> "Ft. Deposit, Ala. 12-16-1919. J. K. Lewis, 411 Poydras Street, New Orleans, La. Offer you one thousand or fifteen hundred pounds Frotchers pecans at *50c* f. o. b. Ft. Deposit. Answer. C. H. Priester."

The message was correctly transmitted to the main office of petitioner at New Orleans but in relaying it between branch offices maintained by the company to expedite business in the downtown section of New Orleans, it was altered to read:

> "J. K. Lewis, N. O. La. Offer you 1000 or 1500 pounds Frothiers at *15 cents* f. o. b. Deposit. Answer. C. H. Priester."

Upon receipt of the message by Lewis, he telegraphed respondent, Priester, that he would take 1500 pounds of pecans offered and in reliance upon such message, respondent Priester shipped to Lewis 1006 pounds of pecans and received pay therefor at the rate of 15c per pound instead of 50c per pound as originally offered by him.

On July 21, 1920, respondent Priester filed suit for damages against petitioner in the circuit court of Butler County, Alabama, the complaint consisting of a single count alleging negligence in the transmission of the telegram. There were three trials of the suit in the circuit court of Butler County, and the pleadings were several times amended. For the purposes of this petition it will suffice to say that the trial as finally had was upon two counts alleging *gross* negligence on the part of the defendant's agents or employees in and about the transmission and delivery of the message and special pleas setting up two separate Federal defenses: (1) The interstate nature of the message; that it was sent as an unrepeated message and under the company's rules, regulations and tariffs on file with the Interstate Commerce Commission the damages were limited to the amount paid for sending the message; (2) that the message was an interstate message and that under the company's rules, regulations and tariffs on file with the Interstate Commerce Commission at the time of sending the message the company's liability was limited to $50.00, at which the said message had been valued by the sender. The Federal defenses were raised at every stage of the proceedings, including pleas to the original and amended complaints, rulings on pleadings, on the admission of evidence, requested charges and motion for a new trial.

On the last trial the circuit court of Butler County submitted the case to the jury solely on the issue of gross negligence on the part of the petitioner's servants or agents in

and about the transmission of the message and charged the jury that if under the evidence the jury should find that the agents of the defendant "did not bestow the care and skill which the situation demanded they should bestow", the plaintiff could recover. The jury returned a verdict for respondent Priester for $514.07 and judgment was entered accordingly. After the trial court had overruled a motion for a new trial, which again raised the Federal defenses, an appeal was taken to the Court of Appeals of Alabama, which court has final jurisdiction of suits at law where the amount involved does not exceed $1,000.00. (Code Alabama 1923, Sec. 7309). The Court of Appeals of Alabama on the 26th day of October, 1926, affirmed the judgment of the circuit court of Butler County. Whereupon petitioner on the 4th day of November, 1926, filed an application in said Court of Appeals of Alabama for a rehearing, which said petition for a rehearing was denied on the 9th day of November, 1926. Thereupon, petitioner on the 22nd day of November, 1926, filed in the Supreme Court of Alabama, which court under Sec. 140 of the Constitution of Alabama has supervisory power over the Court of Appeals, a petition in strict accordance with rule 44 of the said Supreme Court (Code of Alabama, 1923, Volume IV, p. 894) for a writ of certiorari to the Court of Appeals to review and determine the decision rendered by the Court of Appeals in said cause on the 26th day of October, 1926, and in support of said petition for certiorari in the Supreme Court, did file a brief and argument as required by the rules of said court; and on the 13th day of January, 1927, the Supreme Court of Alabama entered an order denying said petition for certiorari.

The reasons relied on for the allowance of the writ of certiorari from the Supreme Court of the United States to the Supreme Court of Alabama are as follows:

1st. The Supreme Court of Alabama erred in not granting a writ of certiorari to the Court of Appeals of Alabama directing said Court to reverse the said judgment of the Circuit Court of Butler County, Ala., as by such action it expressed its approval of the decision of said Court of Appeals of Alabama in affirming a judgment against petitioner for more than $50.00, based on *gross* negligence on the part of petitioner's agents on account of an error made in the transmission of an interstate telegraphic message not specially valued by the sender, where liability for such default was specially limited to the sum of $50.00 by the company's tariffs and classifications on file with the Interstate Commerce Commission; such decision of the Court of Appeals being in conflict with the decision of this Court in the case of *Western Union Telegraph Company v. Czizek*, 264 U. S. 281.

2nd. The Supreme Court of Alabama erred in not granting a writ of certiorari to the Court of Appeals of Alabama directing said Court to reverse the said judgment of the Circuit Court of Butler County, Ala., as by such action it expressed its approval of the decision of said Court of Appeals of Alabama in affirming a judgment against petitioner for more than the toll paid, based on *gross* negligence on the part of petitioners' agents on account of an error made in the transmission of an unrepeated interstate telegraphic message, where liability for such default was limited to the toll paid by the company's tariffs and classifications on file with the Interstate Commerce Commission; such decision of the Court of Appeals of Alabama being probably not in accord with applicable decisions of this Court.

Your petitioner believes that the aforesaid judgment of the Supreme Court of Alabama is erroneous and that this Honorable Court should require the said case to be certified

to it for its review and determination in conformity with the provisions of the Act of Congress and the rules of this Honorable Court in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of Alabama, commanding the said Court to certify and send to this Court on a day certain to be designated therein, a full and complete transcript of the record and all proceedings of the said Supreme Court of Alabama in said case therein entitled *Ex parte Western Union Telegraph Co. In re: Western Union Telegraph Company, Appellant, v. C. H. Priester, Appellee,* 3rd Division, No. 783, to the end that the said case may be reviewed and determined by this Court as provided in Judicial Code, Sec. 337 (b) as amended by the Act of February 13, 1925; or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Supreme Court of Alabama in said case and every part thereof may be reversed by this Honorable Court and your petitioner will ever pray.

FRANCIS R. STARK,

RAY RUSHTON,
*Attorneys for Petitioner.*

STATE OF ALABAMA,
MONTGOMERY COUNTY.

Ray Rushton, being duly sworn, deposes and says that he is one of the attorneys for the petitioner in the foregoing petition and has read the same; that he is duly authorized to make this affidavit on behalf of said petitioner; that the same is true to his own knowledge, information and belief, that his knowledge is derived from the record in the case and from what has taken place in his presence and hearing in the courts in which said action has been heard.

RAY RUSHTON.

Sworn to and subscribed before me this the..... day of March, 1927.

.....
*Notary Public.*

My commission expires.....day of....., 19.....

I HEREBY CERTIFY that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this Court.

RAY RUSHTON,
*Of Counsel for Petitioner.*

WESTERN UNION TELEGRAPH COMPANY,
*Petitioner,*

v.

C. H. PRIESTER,
*Respondent.*

IN THE SUPREME COURT OF THE UNITED STATES.

---

The Clerk will enter our appearance as counsel for the petitioner.

FRANCIS R. STARK,

RAY RUSHTON.

# INDEX


Page

Argument ..... 5

Authorities—Interstate Commerce Commission Act as amended June 18, 1910 (36 Stat. L. 539) ..... 2

U. S. Judicial Code, Sec. 237 (b) ..... 3

Grounds on which Jurisdiction of Court is Invoked ..... 1

Opinions Delivered in the Courts Below ..... 1

Statement of the Case ..... 3


LIST OF CASES CITED


Ex Parte Priester, 212 Ala. 271; 102 So. 376 ..... 1, 6

Postal Telegraph-Cable Co. v. Warren-Godwin Lbr. Co., 251 U. S. 27 ..... 3, 5, 7

Priester v. Western Union Tel. Co., 20 Ala. App. 388; 102 So. 372 ..... 1

Primrose v. Western Union Tel. Co., 154 U. S. 1 ..... 6, 7

Western Union Tel. Co. v. Boegli, 251 U. S. 315 ..... 5

Western Union Tel. Co. v. Czizek, 264 U. S. 281 ..... 3, 6, 7

Western Union Tel. Co. v. Esteve Bros., 256 U. S. 566 ..... 3, 6

Western Union Tel. Co. v. Priester, 18 Ala. App. 531; 93 So. 231 ..... 1, 6

# IN THE
# SUPREME COURT OF THE UNITED STATES

October Term 1926-27.

---

WESTERN UNION TELEGRAPH COMPANY,
*Petitioner*

v.

C. H. PRIESTER,
*Respondent.*

---

## BRIEF OF PETITIONER ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

---

**Official Reports of Opinions Delivered in the Courts Below:**

*Western Union Telegraph Company v. Priester*, 18 Ala. App. 531; 93 So. 231.
*Priester v. Western Union Telegraph Company*, 20 Ala. App. 388; 102 So. 372.
*Ex parte Priester*, 212 Ala. 271; 102 So. 376.
*Western Union Telegraph Company v. Priester*, (Not Reported, R. 124).

## GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED:

1. To review a judgment of the Court of Appeals of Alabama (R. 129), the highest court of the state in which a decision could be had, of October 26, 1926 (said judgment

becoming final on January 13, 1927, upon denial by the Supreme Court of Alabama of writ of certiorari to the Court of Appeals, R. 148), affirming a judgment of the circuit court of Butler County, Alabama, in favor of respondent, Priester, on a complaint charging *gross* negligence in the transmission of an interstate telegram sent as a not specially valued and as an unrepeated message, where petitioner separately denied liability under its tariffs on file with the Interstate Commerce Commission of more than (A) $50.00, the amount at which the message had been valued by the sender, and (B) the toll paid, under its unrepeated message classification limiting liability to such amount.

2. A. Petitioner claimed in the circuit court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Supreme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, its liability for default in the transmission of an interstate telegraphic message not specially valued was limited to $50.00 and this liability was not affected by the degree of negligence on the part of its agents. This claim was denied by said Courts of Alabama and a recovery of more than $50.00 permitted on a complaint charging *gross* negligence. (R. 20, 27, 35, 42, 44, 45, 47, 119, 121, 125, 129, 136, 147).

B. Petitioner claimed in the circuit court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Supreme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, its liability on account

of an error made in the transmission of an unrepeated interstate telegraphic message was limited to the amount paid for sending the message and that this liability was not affected by the degree of negligence on the part of its agents. This claim was denied by said courts of Alabama and a recovery of more than the toll paid permitted on a complaint charging *gross* negligence. (R. 20, 25, 35, 39, 41, 44, 45, 47, 119, 121, 125, 129, 136, 137.)

3. Jurisdiction is invoked under section 237 (b), as amended by the Act of February 13, 1925, of the United States Judicial Code.

4. Cases believed to sustain the jurisdiction:

*Postal Telegraph-Cable Co. v. Warren-Godwin Lbr. Co.* 251 U. S. 27

*Western Union Telegraph Co. v. Esteve Brothers,* 256 U. S. 566

*Western Union Telegraph Company v. Czizek,* 264 U. S. 281.

## STATEMENT OF THE CASE

An error was made by petitioner's agents in the transmission of a telegram from Ft. Deposit, Alabama, to New Orleans, La., by changing "fifty" to "fifteen" in an offer to sell pecans, by reason of which error respondent suffered a pecuniary loss of $352.10. (R. 150, 151, 152). Respondent in his action for damages against petitioner in the circuit court of Butler County, Alabama, charged that the error was the result of *gross* negligence on the part of petitioner's agents. (R. 3, 20, 21.) Petitioner by pleas, introduction of testimony, requested written charges and motion for new trial, interposed two Federal defenses: (1) That the message was not sent as a specially valued message and

under the Company's tariffs and classifications on file with the Interstate Commerce Commission, its liability was limited to $50.00; (2) that the message was an unrepeated message and under the Company's tariffs and classifications on file with the Interstate Commerce Commission liability for error in an unrepeated interstate message was limited to the toll paid. (R. 25, 39, 45, 47, 79, 96, 97, 112, 113, 119).

The Federal defenses set up by petitioner were denied application to an action charging *gross* negligence by the trial court. (.R 44, 45, 46, 47, 114, 121.) The trial court charged the jury:

"The question you are to determine is, whether or not under the conditions and circumstances under which this message was delivered and transmitted, the defendant through its agents and servants, did *bestow the care and skill* which the situation demanded they *should* bestow. If they did and there was a mistake in the transmission of the message the plaintiff could not recover, but if they did *not* the plaintiff would be entitled to recover the damages which the testimony, after you have considered it all, shows the plaintiff suffered by reason of the error or mistake of the defendant. That is all there is in the case." (R. 111.) Petitioner duly excepted to the foregoing portion of the court's oral charge, which exception was allowed by the court. (R. 112, 113).

All of the rulings of the trial court denying petitioner the benefit of the Federal defenses as against a complaint alleging *gross* negligence were duly assigned as error in the Court of Appeals of Alabama. (R. 124-127). None of the assignments of error were held good by the Court of Appeals of Alabama, which court has final jurisdiction of suits at law where the amount involved does not exceed $1000.00 (Code of Alabama 1923, Sec. 7309), and on Oct-

ober 26, 1926, said court affirmed the judgment of the circuit court of Butler County, Alabama. (R. 129). Whereupon, petitioner on November 4, 1926, duly filed its application for rehearing in said Court of Appeals supported by brief, (R. 130-134), which application was overruled on November 9, 1926. (R. 134). On November 22, 1926, (R. 147) petitioner filed with the Supreme Court of Alabama, which court has supervisory power over the Court of Appeals under Sec. 140 of the Constitution of Alabama, a petition for certiorari to the Court of Appeals (R. 136) which petition was denied by the Supreme Court of Alabama on January 13, 1927 (R. 148).

## ARGUMENT

In a series of well considered cases this Court has definitely determined and settled the following propositions relating to the duties and liabilities of telegraph companies with respect to their interstate business, since the amendment to the Interstate Commerce Act of June 18, 1910:

1. That such companies are subject to the rule of equality of rates and uniformity of obligation which it was the purpose of the Interstate Commerce Act to establish. (*Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 1919; *Western Union Telegraph Company v. Boegli*, 251 U. S. 315, 1920).

2. That without assent in fact the sender is bound as a matter of law by a provision in the company's lawfully established tariffs limiting liability for mistake in the transmission of unrepeated messages to the amount of the toll paid, where the tariff offers alternative rates for repeated and unrepeated messages; that the rate is law-fixed and the liability law-imposed and neither can be departed

from by the parties. (*Western Union Telegraph Company v. Esteve Brother*, 256 U. S. 566, 1921).

3. That a provision in the company's message tariffs limiting liability to $50.00 unless the message is specially valued is valid and is a good defense in an action where there had been a complete failure to transmit the message from the office of origin and in addition the company had mistakenly informed the sender when he inquired, that the message had been duly sent; that even where *gross* negligence on the part of the company's agents was claimed and proven to the satisfaction of the lower court, in the case of a valued message the addition of a *"vituperative epithet"* to the admitted fault would not authorize a recovery beyond the amount at which the message had been valued.— (*Western Union Telegraph Company v. Czizek*, 264 U. S. 281, 1924).

The Alabama courts recognize the binding effect of the foregoing decisions of this Court but they have reached the erroneous conclusion that these decisions have not affected the application to cases arising since the amendment of June 18, 1910, of the principle of law supposed to have been approved by this Court in the case of *Primrose v. Western Union Telegraph Company*, 154 U. S. 1, (1894), that a contract limiting liability for default in the transmission and delivery of a telegraphic message is void where such default was caused by *"gross"* negligence on the part of the telegraph company's agents.— (*Western Union Telegraph Company v. Priester*, 18 Ala. App. 531; *Ex parte Priester*, 212 Ala. 271.) In response to an application by respondent for a writ of certiorari to the Court of Appeals on the second appeal in this case, the Supreme Court of Alabama stated that since the amendment of 1910, "rights and liabilities arising out of interstate messages depend upon acts of Congress, the contract between the parties, and common

law principles as declared and enforced by the Federal courts", and further stated that under Federal decisions "the failure to exercise that degree of care which the situation—its regulation included—demanded, was gross negligence against which it (petitioner) could not contract." —(212 Ala. p. 273).

This opinion of the Supreme Court was binding upon the Court of Appeals on the third appeal and is the error which permeates the subsequent proceedings in the case. The above definition of *"gross"* negligence given by the Supreme Court of Alabama and followed by the trial court in its charge to the jury is nothing more than the commonly accepted definition of *simple* negligence.

Under the decisions of this Court cited above, since the amendment of June 18, 1910, the rights and liabilities of parties arising out of interstate messages do not depend upon either "the contract between the parties" or "common law principles as declared and enforced by the Federal courts." Such rights and liabilities depend entirely upon the legally established tariffs, rules, regulations and classifications of telegraph companies engaged in interstate business. The Primrose case arose under common law principles which principles no longer apply. The misconception of the effect of the Primrose case on the part of the Supreme Court of Alabama was caused, in part at least, by the fact that this Court in the Warren-Godwin Lumber Company case and the Czizek case cited the Primrose case, and the Alabama court overlooked the fact that such citations were not to the point that gross negligence has any effect on the present liability of telegraph companies. It is respectfully urged, therefore, that this Court should in unmistakable terms announce that, whatever the degree of negligence, so long as it does not amount to wilful or inten-

tional conduct, the rule of uniformity required by the Interstate Commerce Commission Act obtains.

If the decisions of the Court of Appeals and of the Supreme Court of Alabama in this case are to be permitted by this Court to stand, the decisions of this Court cited above are in practical effect nullified. The whole object of the Interstate Commerce Act is to secure equality and uniformity of rate and obligation, and to permit the various state courts to apply their different and probably conflicting ideas and definitions as to what constitutes *"gross"* negligence would put the law pertaining to the duties and obligations of interstate telegraph companies back to where it was before the amendment of June 18, 1910.

Respectfully submitted,

FRANCIS R. STARK,

RAY RUSHTON,
Attorneys for Petitioner.

RUSHTON, CRENSHAW & RUSHTON,
*of Montgomery, Alabama,*
*Of Counsel.*

Office Supreme Court, U. S.
FILED
MAR 7 1927
WM. R. STANSBURY
CLERK

No. [redacted] 189

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1926-27.

---

WESTERN UNION TELEGRAPH COMPANY,
*Petitioner*

v.

C. H. PRIESTER,
*Respondent.*

---

## BRIEF OF PETITIONER ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BROWN PRINTING CO. MONTGOMERY, 1927

# INDEX


Page

Argument ..... 5

Authorities—Interstate Commerce Commission Act as amended June 18, 1910 (36 Stat. L. 539) ..... 2
U. S. Judicial Code, Sec. 237 (b) ..... 3

Grounds on which Jurisdiction of Court is Invoked ..... 1

Opinions Delivered in the Courts Below ..... 1

Statement of the Case ..... 3


LIST OF CASES CITED


Ex Parte Priester, 212 Ala. 271; 102 So. 376 ..... 1, 6

Postal Telegraph-Cable Co. v. Warren-Godwin Lbr. Co., 251 U. S. 27 ..... 3, 5, 7

Priester v. Western Union Tel. Co., 20 Ala. App. 388; 102 So. 372 ..... 1

Primrose v. Western Union Tel. Co., 154 U. S. 1 ..... 6, 7

Western Union Tel. Co. v. Boegli, 251 U S. 315 ..... 5

Western Union Tel Co. v. Czizek, 264 U. S. 281 ..... 3, 6, 7

Western Union Tel. Co. v. Esteve Bros., 256 U. S. 566 ..... 3, 6

Western Union Tel. Co. v. Priester, 18 Ala. App. 531; 93 So. 231 ..... 1, 6

# IN THE
# SUPREME COURT OF THE UNITED STATES

October Term 1926-27.

---

WESTERN UNION TELEGRAPH COMPANY,
*Petitioner*
v.
C. H. PRIESTER,
*Respondent.*

---

## BRIEF OF PETITIONER ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

---

Official Reports of Opinions Delivered in the Courts Below:

*Western Union Telegraph Company v. Priester*, 18 Ala. App. 531; 93 So. 231.
*Priester v. Western Union Telegraph Company*, 20 Ala. App. 388; 102 So. 372.
*Ex parte Priester*, 212 Ala. 271; 102 So. 376.
(Not Reported, R. 124).
*Western Union Telegraph Company v. Priester*,

## GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED:

(1) To review a judgment of the Supreme Court of the State of Alabama (R. 148), the highest court of the State, of January 13, 1927, denying the petition of petitioner for a writ of certiorari directed to the Court of Appeals of Alabama (R. 136-146) to review and determine the decision of said Court of Appeals of Alabama rendered on the 26th day of October, 1926 (R. 135), affirming a judgment of the

circuit court of Butler County, Alabama, in favor of respondent, Priester, on a complaint charging *gross* negligence in the transmission of an interstate telegram sent as a not specially valued and as an unrepeated message, where petitioner separately denied liability under its tariffs on file with the Interstate Commerce Commission of more than (A) $50.00, the amount at which the message had been valued by the sender, and (B) the toll paid, under its unrepeated message classification limiting liability to such amount.

2. A. Petitioner claimed in the circuit court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Supreme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, its liability for default in the transmission of an interstate telegraphic message not specially valued was limited to $50.00 and this liability was not affected by the degree of negligence on the part of its agents. This claim was denied by said Courts of Alabama and a recovery of more than $50.00 permitted on a complaint charging *gross* negligence. (R. 20, 27, 35, 42, 44, 45, 47, 119, 121, 125, 129, 136, 147).

B. Petitioner claimed in the circuit court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Supreme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, its liability on account of an error made in the transmission of an unrepeated interstate telegraphic message was limited to the amount paid for sending the message and that this liability was not

affected by the degree of negligence on the part of its agents. This claim was denied by said courts of Alabama and a recovery of more than the toll paid permitted on a complaint charging *gross* negligence. (R. 20, 25, 35, 39, 41, 44, 45, 47, 119, 121, 125, 129, 136, 147.)

3. Jurisdiction is invoked under section 237 (b), as amended by the Act of February 13, 1925, of the United States Judicial Code.

4. Cases believed to sustain the jurisdiction:

*Postal Telegraph-Cable Co. v. Warren-Godwin Lbr. Co.* 251 U. S. 27.

*Western Union Telegraph Co. v. Esteve Brothers,* 256 U. S. 566

*Western Union Telegraph Company v. Czizek,* 264 U. S. 281.

## STATEMENT OF THE CASE

An error was made by petitioner's agents in the transmission of a telegram from Ft. Deposit, Alabama, to New Orleans, La., by changing "fifty" to "fifteen" in an offer to sell pecans, by reason of which error respondent suffered a pecuniary loss of $352.10. (R. 150, 151, 152). Respondent in his action for damages against petitioner in the circuit court of Butler County, Alabama, charged that the error was the result of *gross* negligence on the part of petitioner's agents. (R. 3, 20, 21.) Petitioner by pleas, introduction of testimony, requested written charges and motion for new trial, interposed two Federal defenses: (1) That the message was not sent as a specially valued message and under the Company's tariffs and classifications on file with the Interstate Commerce Commission, its liability was limited to $50.00; (2) that the message was an unrepeated

message and under the Company's tariffs and classifications on file with the Interstate Commerce Commission liability for error in an unrepeated interstate message was limited to the toll paid. (R. 25, 39, 45, 47, 79, 966, 97, 112, 113, 119).

The Federal defenses set up by petitioner were denied application to an action charging *gross* negligence by the trial court. (R. 44, 45, 46, 47, 114, 121.) The trial court charged the jury:

"The question you are to determine is, whether or not under the conditions and circumstances under which this message was delivered and transmitted, the defendant through its agents and servants, did *bestow the care and skill* which the situation demanded they *should* bestow. If they did and there was a mistake in the transmission of the message the plaintiff could not recover, but if they did *not* the plaintiff would be entitled to recover the damages which the testimony, after you have considered it all, shows the plaintiff suffered by reason of the error or mistake of the defendant. That is all there is in the case." (R. 111.) Petitioner duly excepted to the foregoing portion of the court's oral charge, which exception was allowed by the court. (R. 112, 113).

All of the rulings of the trial court denying petitioner the benefit of the Federal defenses as against a complaint alleging *gross* negligence were duly assigned as error in the Court of Appeals of Alabama. (R. 124-127). None of the assignments of error were held good by the Court of Appeals of Alabama, which court has final jurisdiction of suits at law where the amount involved does not exceed $1000.00 (Code of Alabama 1923, Sec. 7309), and on October 26, 1926, said court affirmed the judgment of the circuit court of Butler County, Alabama. (R. 129). Where-

upon, petitioner on November 4, 1926, duly filed its application for rehearing in said Court of Appeals supported by brief (R. 130-134), which application was overruled on November 9, 1926. (R. 134). On November 22, 1926 (R. 147), petitioner filed with the Supreme Court of Alabama, which court has supervisory power over the Court of Appeals under Sec. 140 of the Constitution of Alabama, a petition for certiorari to the Court of Appeals (R. 136) which petition was denied by the Supreme Court of Alabama on January 13, 1927 (R. 148).

## ARGUMENT

In a series of well considered cases this Court has definitely determined and settled the following propositions relating to the duties and liabilities of telegraph companies with respect to their interstate business, since the amendment to the Interstate Commerce Act of June 18, 1910:

1. That such companies are subject to the rule of equality of rates and uniformity of obligation which it was the purpose of the Interstate Commerce Act to establish. (*Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 1919; *Western Union Telegraph Company v. Boegli*, 251 U. S. 315, 1920).

2. That without assent in fact the sender is bound as a matter of law by a provision in the company's lawfully established tariffs limiting liability for mistake in the transmission of unrepeated messages to the amount of the toll paid, where the tariff offers alternative rates for repeated and unrepeated messages; that the rate is law-fixed and the liability law-imposed and neither can be departed from by the parties. (*Western Union Telegraph Company v. Esteve Brothers*, 256 U. S. 566, 1921).

3. That a provision in the company's message tariffs limiting liability to $50.00 unless the message is specially valued is valid and is a good defense in an action where there had been a complete failure to transmit the message from the office of origin and in addition the company had mistakenly informed the sender when he inquired, that the message had been duly sent; that even where *gross* negligence on the part of the company's agents was claimed and proven to the satisfaction of the lower court, in the case of a valued message the addition of a *"vituperative epithet"* to the admitted fault would not authorize a recovery beyond the amount at which the message had been valued.—(*Western Union Telegraph Company v. Czizek*, 264 U. S. 281, 1924).

The Alabama courts recognize the binding effect of the foregoing decisions of this Court but they have reached the erroneous conclusion that these decisions have not affected the application to cases arising since the amendment of June 18, 1910, of the principle of law supposed to have been approved by this Court in the case of *Primrose v. Western Union Telegraph Company*, 154 U. S. 1 (1894), that a contract limiting liability for default in the transmission and delivery of a telegraphic message is void where such default was caused by *"gross"* negligence on the part of the telegraph company's agents.—(*Western Union Telegraph Company v. Priester*, 18 Ala. App. 531; *Ex parte Priester*, 212 Ala. 271.) In response to an application by respondent for a writ of certiorari to the Court of Appeals on the second appeal in this case, the Supreme Court of Alabama stated that since the amendment of 1910, "rights and liabilities arising out of interstate messages depend upon acts of Congress, the contract between the parties, and common law principles as declared and enforced by the Federal courts", and further stated that under Federal decisions "the failure to exercise that degree of care which the sit-

uation—its regulation included—demanded, was gross negligence against which it (petitioner) could not contract." —(212 Ala. p. 273).

This opinion of the Supreme Court was binding upon the Court of Appeals on the third appeal and is the error which permeates the subsequent proceedings in the case. By denying the petition of petitioner for a writ of certiorari to the Court of Appeals on the last appeal, the Supreme Court adhered to and reaffirmed its ideas of the principles of law applicable to an error made in the transmission of an interstate telegraph message. The above definition of *"gross"* negligence given by the Supreme Court of Alabama and followed by the trial court in its charge to the jury is nothing more than the commonly accepted definition of *simple* negligence.

Under the decisions of this Court cited above, since the amendment of June 18, 1910, the rights and liabilities of parties arising out of interstate messages do not depend upon either "the contract between the parties" or "common law principles as declared and enforced by the Federal courts." Such rights and liabilities depend entirely upon the legally established tariffs, rules, regulations and classifications of telegraph companies engaged in interstate business. The Primrose case arose under common law principles which principles no longer apply. The misconception of the effect of the Primrose case on the part of the Supreme Court of Alabama was caused, in part at least, by the fact that this Court in the Warren-Godwin Lumber Company case and the Czizek case cited the Primrose case, and the Alabama court overlooked the fact that such citations were not to the point that gross negligence has any effect on the present liability of telegraph companies. It is respectfully urged, therefore, that this Court should in unmistakable terms announce that, whatever the degree of

negligence, so long as it does not amount to wilful or intentional conduct, the rule of uniformity required by the Interstate Commerce Commission Act obtains.

If the decisions of the Court of Appeals and of the Supreme Court of Alabama in this case are to be permitted by this Court to stand, the decisions of this Court cited above are in practical effect nullified. The whole object of the Interstate Commerce Act is to secure equality and uniformity of rate and obligation, and to permit the various state courts to apply their different and probably conflicting ideas and definitions as to what constitutes "*gross*" negligence would put the law pertaining to the duties and obligations of interstate telegraph companies back to where it was before the amendment of June 18, 1910.

Respectfully submitted,

FRANCIS R. STARK,

RAY RUSHTON,
Attorneys for Petitioner.

RUSHTON, CRENSHAW & RUSHTON,
*of Montgomery, Alabama,*
*Of Counsel.*

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1927.
No. 916.

WESTERN UNION TELEGRAPH COMPANY,
*Petitioner*

vs.

C. H. PRIESTER.

On Writ of Certiorari to the Court of Appeals of the State of Alabama. Petition for Certiorari filed February 21, 1927. Certiorari granted April 18, 1927.

No. 958.

WESTERN UNION TELEGRAPH COMPANY,
*Petitioner*

vs.

C. H. PRIESTER.

On Writ of Certiorari to the Supreme Court of the State of Alabama. Petition for Certiorari filed March 7, 1927. Certiorari granted April 18, 1927.

## BRIEF OF FRANCIS R. STARK AND RAY RUSHTON FOR PETITIONER

## (a) SUBJECT INDEX


| | Page |
|---|---|
| Official Reports of Opinions Delivered in Courts Below | 5 |
| Grounds on which the Jurisdiction of the Court is Invoked | 5 |
| Cases Believed to Sustain the Jurisdiction | 7 |
| Statement of the Case | 8 |
| Summary of Argument | 14 |
| Argument | 16 |
| Appendix (History of Telegraph Stipulations and Regulations Limiting Liability) | 32 |


## TABLE OF CASES.


| | |
|---|---|
| Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314 | 45 |
| Boston & Maine R. Co. v. Hooker, 233 U. S. 97 | 19 |
| Cultra v. Western Union Tel. Co., 44 I. C. C. 670 | 22, 35, 37, 40 |
| Dickerson v. Western Union Tel. Co., 114 Miss. 115, 74 So. 779 | 24, 36, 39 |
| Fleischner v. Pacific Postal Tel. Co., 55 F. 738 | 18 |
| Galveston H. & S. A. R. Co. v. Woodbury, 254 U. S. 357 | 19, 40 |
| Gardner v. Western Union Tel. Co., 145 C. C. A. 399, 231 Fed. 405 | 38 |
| Interstate Commerce Act, Amendment to, June 18, 1910, 36 Stat. L. 539 | 32, 35, 37, 40, 41 |
| Kirsch v. Postal Tel. Co., 100 Kan. 250, 252, 164 Pac. 267 | 22, 45 |
| Matthews v. Huwe, 269 U. S. 262 | 5, 30 |
| Milwaukee and St. Paul Ry. Co. v. Arms, 91 U. S. 489, 493, 495 | 18 |
| New World v. King, 16 How. 469 | 18 |
| Norfolk & Suburban Turnpike Co. v. Virginia, 225 U. S. 264 | 5, 30 |
| Phil. & Reading R. R. Co. v. Derby, 14 How. 468, 485, 486 | 18 |
| Postal Tel.-Cable Co. v. Dickerson, 79 So. 719 | 39 |
| Postal Tel.-Cable Co. v. Dickerson, 254 U. S. 609 | 39 |

Page

Postal Tel. Cable Co. v. Minderhout, 195 Ala. 420, 71 So. 91 ..... 29, 30
Postal Tel. Cable Co. v. Nichols, 159 Fed. 643 ..... 18
Postal Tel. Cable Co. v. Warren-Godwin Lbr. Co., 251 U. S. 27 ..... 7, 24, 27, 36, 39, 40, 41, 43, 45
Priester, Ex parte, 212 Ala. 271, 102 So. 376 ..... 5, 10
Priester v. Western Union Tel. Co., 20 Ala. App. 388, 102 So. 372 ..... 5, 10
Primrose v. Western Union Tel. Co., 154 U. S. 1 ..... 17, 43, 45
Story on Bailments, 8th Ed. 511 ..... 18
United States Judicial Code, Sec. 237 (b), amended by the Act of February 13, 1925 ..... 7
Unrepeated Message Case, 44 I. C. C. 670 ..... 23, 35, 37, 40, 46
Unrepeated Message Case (Second), 61 I. C. C. 541 ..... 23, 42, 44, 45, 46
Western Union Tel. Co. v. Boegli, 251 U. S. 315 ..... 24, 38, 39
Western Union Tel. Co. v. Crovo, 220 U. S. 364 ..... 5, 30
Western Union Tel. Co. v. Czizek, 264 U. S. 281 ..... 7, 21, 28, 44
Western Union Tel. Co. v. Czizek, 272 Fed. 223 ..... 44
Western Union Tel. Co. v. Czizek, 286 Fed. 478 ..... 22
Western Union Tel. Co. v. Esteve Bros., 256 U. S. 566 ..... 9, 19, 39, 45
Western Union Tel. Co. v. C. H. Priester, 215 Ala. 435, 111 So. 200 ..... 5, 13
Western Union Tel. Co. v. Priester, 21 Ala. App. 587, 111 So. 199 ..... 5, 12
Western Union Tel. Co. v. Priester, 18 Ala. App. 531, 93 So. 231 ..... 5, 9
Western Union Tel. Co. v. Showers, 104 Miss. 411, 73 So. 276 ..... 36
Western Union Tel. Co. v. Southwick, 255 U. S. 565, 65 L. Ed. 788 ..... 7, 27, 38
White v. Western Union Tel. Co., 14 F. 710 ..... 18
Wilson v. Brett, 11 Mees. & Wels., 113 ..... 18

(b) Official Reports of Opinions delivered in the courts below:

*Western Union Telegraph Company vs. Priester,* 18 Ala. App. 531; 93 So. 231.
*Priester vs. Western Union Telegraph Company,* 20 Ala. App. 388; 102 So. 372.
*Ex Parte Priester,* 212 Ala. 271; 102 So. 376.
*Western Union Telegraph Company vs. Priester,* 21 Ala. App. 587, 111 So. 199.
*Western Union Telegraph Company vs. C. H. Priester,* 215 Ala. 435, 111 So. 200.

(c) *Grounds on which the jurisdiction of the Court is invoked*:

While counsel for petitioner are reasonably satisfied that the writ of ceritiorari should run from this Court to the Court of Appeals of Alabama, (*Norfolk & Suburban Turnpike Co. v. Virginia,* 225 U. S. 264; *Western Union Telegraph Company v. Crovo,* 220 U. S. 364), nevertheless, because of some uncertainties which still remain in view of what was said in *Matthews v. Huwe,* 269 U. S. 262 (70 L. Ed. 266), we thought it not improper, out of abundant caution, to ask for a writ directed also to the Supreme Court of the State of Alabama. Both petitions were granted by this Court on April 18, 1927 (R. 149), and while docketed separately as No. 916 and No. 958, we are informed by the Clerk that they will be heard as one case and that no motion to consolidate under Clause 8 of Rule 18 is necessary.

The petition in No. 916 is to review the judgment dated Tuesday, October 26, 1926 (R. 129), of the Court of Appeals of the State of Alabama, the highest court of the State in which a decision could be had, said judgment becoming final on January 13, 1927, upon denial by the Supreme

Court of Alabama of writ of certiorari to the Court of Appeals (R. 148), affirming a judgment of the circuit court of Butler County, Alabama, in favor of respondent, Priester, on two counts in a complaint charging *gross* negligence in the transmission of an interstate telegram sent as an unrepeated and not specially valued message; where petitioner separately denied liability under its tariffs on file with the Interstate Commerce Commission for more than (a) the toll paid, under its unrepeated message classification limiting liability to such amount, and (b) $50.00, the amount at which the message had been valued by the sender. The petition in No. 958 is to review a judgment of the Supreme Court of the State of Alabama, the highest court of the State, dated Thursday, January 13, 1927 (R. 148), denying the petition of petitioner for a writ of certiorari directed to the Court of Appeals of Alabama (R. 136-146) to review the said decision of said Court of Appeals of Alabama.

2-A. Petitioner claimed in the Circuit Court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Supreme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission its liability on account of an error made in the transmission of an unrepeated interstate telegraphic message was limited to the amount paid for sending the message and that this liability was not affected by the degree of negligence on the part of its agents. This claim was denied by said courts of Alabama and a recovery of more than the toll permitted on a complaint charging *gross* negligence (R. 20, 25, 35, 39, 41, 44, 45, 119, 121, 125, 136, 147).

2-B. Petitioner claimed in the Circuit Court of Butler County, Alabama, in the Court of Appeals of Alabama and, upon petition for certiorari to the Court of Appeals, in the Su-

preme Court of Alabama, that since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, its liability for default in the transmission of an interstate telegraphic message valued by the sender at $50.00 was not affected by the degree of negligence on the part of its agents. This claim was denied by said courts of Alabama and a recovery of more than $50.00 permitted on a complaint charging *gross* negligence. (R. 26, 27, 35, 42, 44, 45, 47, 119, 121, 125, 129, 136, 147.)

3. Jurisdiction is invoked under Section 237 (b) as amended by the Act of February 13, 1925, of the United States Judicial Code.

4. Cases believed to sustain the jurisdiction:

*Postal Telegraph-Cable Co. vs. Warren-Godwin Lumber Co.*, 251 U. S. 27.

*Western Union Tel. Co. v. Southwick*, 255 *U. S.* 565.

*Western Union Tel. Co. v. Czizek*, 264 U. S. 281.

## STATEMENT OF THE CASE.

An error was made by petitioner's agents in the transmission of a telegram from respondent Priester at Fort Deposit, Alabama, to one J. K. Lewis at New Orleans, La., dated December 16, 1919, by changing "fifty" to "fifteen", in an offer to sell pecans, by reason of which error respondent suffered a pecuniary loss of $352.10. (R. 150, 151, 152.) Respondent in his amended complaint on which the last trial was had in the Circuit Court of Butler County, Alabama, charged that the error was the result of *gross* negligence on the part of petitioner's agents (R. 3, 20, 21). Petitioner by pleas, introduction of testimony, requested written charges and motion for new trial, interposed two Federal defenses: (1) That the message was an unrepeated message and under the Company's tariffs and classifications on file with the Interstate Commerce Commission liability for error in an unrepeated interstate message was limited to the toll paid. (R. 25, 39, 45, 47, 79, 96, 97, 112, 113, 119.) (2) That the message was not sent as a specially valued message and under the Company's tariffs and classifications on file with the Interstate Commerce Commission, its liability was limited to $50.00.

The Federal defenses set up by petitioner were denied application to an action charging *gross* negligence by the trial court. (R. 44, 45, 46, 47, 114, 121.)

The message on which the suit was based was delivered to the Telegraph Company over the telephone. (R. 49.) The case was tried three times in the Circuit Court of Butler County, Alabama. The original complaint consisted of one count setting up that the alteration or change in the message in transmission from the word "fifty" to "fifteen", "was done through the negligence of defendant's servants, and agents", etc. (R. 3-4.) To this complaint the Telegraph Company pleaded the general issue and a special defense that the message was an interstate message and that under the Company's

rules, regulations and tariffs on file with the Interstate Commerce Commission the Company's liability for the mistake was limited to the toll paid. (R. 5-12.) The trial court overruled this defense to a case where the message was delivered to the Company over the telephone and plaintiff obtained a judgment for the full amount of his claim, from which judgment the Telegraph Company duly appealed to the Court of Appeals of Alabama, which Court, on the authority of *Western Union Telegraph Company v. Esteve Brothers*, 256 U. S. 566, reversed the judgment of the Circuit Court of Butler County, Alabama, and remanded the cause (*Western Union Telegraph Company v. Priester*, 18 Ala. App. 531; 93 So. 231). The Court of Appeals of Alabama said that "in the absence of an averment in the complaint charging wilful misconduct or gross negligence * * * * * the sender of an unrepeated message from one State to another is charged with the knowledge of the rules governing the sending of such messages and without actual knowledge is legally bound by the provision in the company's lawfully established tariff and also bound to the limits named in such tariff as to the company's liability for mistake in transmission of unrepeated messages to the amount of the tolls collected on the message sent where such tariff offers alternative rates for repeated and unrepeated messages," etc. (18 Ala. App. 531.)

After the reversal of the case, the plaintiff, evidently acting on the suggestion contained in the opinion of the Court of Appeals, amended his complaint on September 27, 1922, by adding counts 2, 3 and 4 (R. 16-17) and at a still later date further amended his complaint by adding counts 5, 6 and 7 (R. 20-21), setting up in count 5 that the negligence and misconduct of defendant's agent "was willfully brought about and willfully done", and, in counts 6 and 7, that the negligence was "gross". To these counts the defendant demurred and the court (R. 24) sustained demurrers to counts 2, 3 and 4, but overruled demurrers to counts 5, 6 and 7. Whereupon, the defendant Telegraph Company re-filed its former pleas and an

additional plea 6 (R. 22). The plaintiff demurred to each of these pleas and the court (R. 24) sustained demurrers to pleas 3, 4, 5 and 6 as to counts 5, 6 and 7 of the complaint but overruled the demurrers to said pleas in so far as they were an answer to count one of the complaint. The result of the second trial of the case in the Circuit Court was a verdict for the plaintiff for the nominal sum of one dollar. From this judgment the plaintiff Priester took an appeal to the Court of Appeals of Alabama, and the Court of Appeals affirmed said judgment (*Priester v. Western Union Telegraph Company*, 20 Ala. App. 388; 102 So. 372). Whereupon, the plaintiff applied to the Supreme Court of Alabama for a writ of certiorari and succeeded in getting that Court to grant the writ of certiorari (*Ex parte Priester*, 212 Ala. 271; 102 So. 376). In accordance with the opinion of the Supreme Court, the Court of Appeals of Alabama reversed and remanded the cause to the circuit court of Butler County in a per curiam opinion (102 So. 376). The case came up for the third trial in the circuit court of Butler County. The defendant substituted for its former special pleas, pleas 2, 3, 4, and 5, setting up both the unrepeated message stipulation and the fifty dollar valuation stipulation and as to each, in four and five, set up estoppel (R. 25-33). The plaintiff demurred to these pleas (R. 33-34), and the court (R. 44-45) sustained demurrers to said pleas in so far as they purported to answer counts 5, 6 and 7 of the complaint. Upon the issue thus joined, the trial was entered into and there was a bill of exceptions (R. 48-121). After the Judge of the Circuit Court of Butler County had proceeded to some extent with his oral charge to the jury, Mr. Powell, plaintiff's attorney, arose and said (R. 110):

> "In order to get the matter simplified, we withdraw the first count of the complaint and rely on the last two counts of the complaint and let remain as far as applicable the last two counts."

Said Circuit Court then proceeded with its oral charge as follows:

> The Court: "So it becomes a question for you to say whether or not the defendant's servants or agents in the transmission of the telegram was guilty of gross negligence in and about its transmission as alleged in the complaint. If it was, the plaintiff would be entitled to recover. If it was not, the plaintiff would not be entitled to recover. That is all there is in the case."

The Court in continuance of its oral charge also said (R. 111):

> "The Supreme Court in defining negligence, says: 'Negligence is a failure to bestow the care and skill which the situation demands'. In other words, it was the duty of the defendant in the transmission of this telegram to handle it with care and with the skill the situation demanded; it was the duty of the defendant to provide itself and its servants and agents with proper instruments for the transmission of the message and with skillful operators for the operation of these instruments. So that the question you are to determine is whether or not under the conditions and circumstances under which this message was delivered and transmitted the defendant through its agents and servants did bestow the care and skill which the situation demanded they should bestow. If they did and there was a mistake in the transmission of the message, the plaintiff could not recover but if they did not, the plaintiff would be entitled to recover the damages which the testimony, after you have considered it all, shows the plaintiff suffered by reason of the error or mistake of the defendant. That is all there is in the case."

The defendant Telegraph Company, before the jury retired, excepted to the above quoted part of the Judge's oral charge (R. 112) and also requested the court in writing to give charges numbered 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14, separately and severally, charging the jury in various ways that

under the Company's regulations on file with the Interstate Commerce Commission, plaintiff could only recover the toll paid with interest, all of which said requested charges were refused and endorsements made upon each of them "Refused, Gamble, Judge" (R. 113-116). After the refusal of the foregoing written charges, the defendant Telegraph Company then requested written charges numbered 15 to 22 inclusive, charging the jury that under the Company's regulations on file with the Interstate Commerce Commission in no event could the Company be held liable for more than $50.00 and interest (R. 116-118). The court also refused to give these written charges. After the jury had returned a verdict for the plaintiff for the full amount claimed, the defendant duly filed a motion for a new trial, again complaining of the refusal of the court to allow the Federal defenses. (R. 119-120.) Motion for new trial was refused (R. 121). Whereupon, the defendant Telegraph Company took an appeal to the Court of Appeals of Alabama, in which appeal the petitioner Telegraph Company duly assigned as error (R. 124-127) all the rulings of the trial court denying petitioner the benefit of the Federal defenses as against the complaint alleging gross negligence. None of the assignments of error were held good by the Court of Appeals of Alabama, which court, except as hereafter mentioned, has final jurisdiction of suits at law where the amount involved does not exceed one thousand dollars (Code of Alabama 1923, Sec. 7309); and on October 26, 1926, said Court affirmed the judgment of the Circuit Court of Butler County, Alabama (R. 129) (*Western Union Telegraph Co. v. Priester*, 21 Ala. App. 587). Whereupon petitioner on November 4, 1926, duly filed its application for rehearing in said Court of Appeals of Alabama, supported by a brief (R. 130-134), which application was overruled on November 9, 1926 (R. 134). On November 22, 1926 (R. 147), petitioner filed in the Supreme Court of Alabama, which Court has supervisory power over the Court of Appeals under Section 140 of the Constitution of Alabama, a petition for certiorari to the Court of Appeals of Alabama (R. 136), which petition was denied by the Supreme

Court of Alabama on January 13, 1927 (R. 148) (*Western Union Telegraph Co. v. Priester*, 215 Ala. 435).

Petitioner thereupon applied to this Court by separate petitions for writs of certiorari to review both the judgment of the Court of Appeals and that of the Supreme Court of Alabama, both of which petitions were granted on April 18, 1927 (R. 149).

## SUMMARY OF ARGUMENT.

### I.

Whatever the earlier rule may have been, it is settled that since the Act of 1910, bringing telegraph companies under the Interstate Commerce Act, the fact that the plaintiff alleges and the jury finds that the telegraph company's negligence is "gross" cannot operate to increase the company's liability beyond the amount specified in the applicable clause of the published tariffs.

### II.

This case involves a simple error in an unrepeated message, and the applicable clause of the published tariffs is that which limited the company's liability to the amount received for sending the message.

### III.

There was no evidence that the negligence was "gross," as distinguished from simple, if that question were at all material.

### IV.

If the degree of negligence were at all material, it was fatal error to charge the jury that they might find the defendant liable if it failed to "Bestow the care and skill which the situation demanded"—i. e., if the defendant was guilty of nothing more than simple negligence.

### V.

In any event the plaintiff could not possibly have been entitled to more than $50, the amount at which the message was valued.

## CONCLUSION:

**The judgment should be reversed and the cause remanded to the appropriate State court for further proceedings not inconsistent with the Federal rule limiting the liability to the amount paid for the message.**

## ARGUMENT.

### I.

**Whatever the earlier rule may have been, it is settled that since the Act of 1910, bringing telegraph companies under the Interstate Commerce Act, the fact that the plaintiff alleges and the jury finds that the telegraph company's negligence is "gross" cannot operate to increase the company's liability beyond the amount specified in the applicable clause of the published tariffs.**

Before telegraph companies were declared to be common carriers for the purposes of the Interstate Commerce Act, by the Act approved June 18, 1910, 36 Stat. L 539, the relations between telegraph companies and their patrons were purely relations of contract.

The question repeatedly arose, and was differently decided in different jurisdictions, whether such companies could be permitted, as a matter of public policy, to limit their liability for errors and delays. Usually the specific question for decision was as to the validity of a provision in the message contract that the company should not be liable for mistakes or delays in the transmission or delivery of an unrepeated message beyond the amount received for sending the same.

Many State courts had held that telegraph companies were in the nature of common carriers, and that it was contrary to public policy to permit them to contract against liability for their own negligence. Since the question never arose unless the telegraph company had been guilty of some negligence, the rule applied by these State courts amounted in ef-

fect to holding that the limitation of liability for unrepeated messages was of no validity whatever.

In other states it was held that telegraph companies were not common carriers, and that no principle of public policy forbade them from limiting their liability, if the limitation was assented to by the sender. Most of these states, however, and notably New York and Massachusetts, were committed to the doctrine that with respect to contracting against liability for the negligence of one's servant a distinction was to be drawn between cases of ordinary negligence on the one hand and cases of gross negligence or wilful misconduct on the other; and the decisions sustaining the right of the telegraph company to limit its liability by contract were usually qualified by the statement that the contract was valid in the absence of gross negligence or wilful misconduct.

This court, in *Primrose v. Western Union*, 154 U. S. 1, was called on to choose between these two conflicting lines of authority; and it chose to approve and adopt the rule that telegraph companies were not common carriers, and might limit their liability for unrepeated messages to the amount received for sending the same. In reaching this result, the court cited and quoted from the opinions of the New York and other State courts, including some expressions of those courts to the effect that the contract was valid in the absence of gross negligence or wilful misconduct; but except as the quotation of these excerpts from state opinions might be supposed to indicate approval of everything that was said therein, there was no independent expression of opinion by this court, in the Primrose case or in any other case, to the effect that there was any magic in the term "gross" negligence that would invalidate the message contract.

On the contrary, this court had consistently refused to recognize that there was any legal distinction between the different degrees of negligence, and had apparently inclined to

if not definitely adopted the view that gross negligence is nothing but negligence with the addition of a vituperative epithet.*

The fact that the decisions of certain State courts recognizing a distinction between gross and simple negligence for this purpose were quoted by this court without disapproval of the distinction apparently led certain of the inferior Federal courts to assume that in telegraph cases, although perhaps in telegraph cases alone, such a distinction should be recognized (*Postal Telegraph-Cable Company v. Nichols,* 159 F. 643; *Fleischner v. Pacific Postal-Tel. Co.,* 55 F. 738; *White v. Western Union,* 14 F. 710); but no other case involving the question came here after the Primrose case was decided until the entire situation was revolutionized by the Act of 1910.

Attached hereto as an Appendix for the convenience of the Court is a History of Telegraph Stipulations and Regulations limiting Liability.

---

**Philadelphia & Reading Railroad v. Derby,* 14 Howard 468, 485, 486;
*The New World v. King,* 16 How. 469, 474;
*Milwaukee & St. Paul Railroad Co. v. Arms,* 91 U. S. 484, 493, 494, 495.

In the last-named case, the court cited with apparent approval the remark of Lord Cranworth (Baron Rolfe) in *Wilson v. Brett,* 11 M. & W. 113 (1843), to the effect that there was "no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet"; as well as the language of Mr. Justice CURTIS in *The New World v. King* (*supra*) that the distinction between gross negligence and ordinary negligence had better be abandoned. The same suggestion was made by Mr. Justice STORY (Bailments, Section 11).

**Degree of Negligence Immaterial Since the Act.**

In 1921 this court decided the case of *Western Union v. Esteve Brothers,* 256 U. S. 566. That case involved a message which had been sent from Spain to New Orleans. It came into the hands of the defendant telegraph company at Havre, France, under such circumstances that it could not be shown that the sender had assented to any contract limiting defendant's liability. It was nevertheless held that the sender (and addressee) were bound by the usual limitations of liability contained in the company's published tariffs. Justice BRANDEIS said:

> "The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the Act the companies had a common law liability from which they might or might not extricate themselves according to views of policy prevailing in the several States. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect. This principle was established in cases involving the limitation upon a carrier's liability for baggage by *Boston & Maine Railroad v. Hooker,* 233 U. S. 97, and *Galveston & San Antonio Ry. Co. v. Woodbury,* decided by this court December 13, 1920. In the former case it was said, 'If the charges filed were un-

reasonable, the only attack which could be made upon such regulation (limiting liability) would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce.' So here the limitation of liability attached to the unrepeated cable rate is binding upon all who send messages to or from foreign countries until it is set aside as unreasonable by the Commission."

It is obvious without argument that in view of this radical change in the relationship between telegraph companies and the public there is no longer any question to be submitted to the triers of the facts—if it was ever proper to submit such a question to them—as to the various shades or degrees of intensity of the fault committed in a particular case by the human agents through which the telegraph company, like other companies, is compelled to conduct its work. The limitation of liability is a part of the rate. If a patron selects the lower rate and is allowed to recover beyond the limitation (which is a part of it) in any case in which a jury may find that the fault was particularly reprehensible, there is an end of uniform liability, and telegraph law is back in the chaotic condition where it was before the act. What one jury may decide is no precedent for any other jury; if the matter is to go to the jury at all, the company can never be certain in any particular case that the finding will not be on the side of "grossness"; and if there is any doubt on the subject a settlement of the claim, even beyond the maximum limitation provided for in the tariff, cannot be criticized as an unlawful preference and may indeed be only common prudence; so the salutary reform effected by the act as interpreted by this court in the Esteve and other cases is undone.

There is no longer any question for the judicial branch of the Government as to whether public policy permits telegraph

companies to limit their liability for unrepeated messages. The legislative branch of the Government has decided that question. The act of 1910 provides that telegraph messages

> "may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such *other* classes as are just and reasonable, and different rates may be charged for the different classes of messages";

and taken in connection with the history of telegraph message contracts and the development of the law applying to them, including this court's decision in the Primrose case, this Congressional permission can mean nothing else than that, subject to the supervision of the Interstate Commerce Commission as to the reasonableness of the limitations, telegraph companies shall be free to proportion their liabilities to their rates and that no patron shall be entitled to be preferred over any other by a settlement of his claim for an amount beyond the maximum protection to which the rate which he has selected entitles him.

## II.

**This case involves a simple error in an unrepeated message, and the applicable clause of the published tariffs is that which limited the company's liability to the amount received for sending the message.**

In *Western Union v. Czizek*, 264 U. S. 281 (1924), the precise question involved in this case was considered and decided. The message here was sent at a time when the telegraph company had in effect and on file with the Interstate Commerce Commission the same message tariffs which were considered in the Czizek case. That is to say, there was a limitation of liability for unrepeated messages to the amount received for sending the same, and a further provision that the company should not be liable in any event beyond the sum of $50, at which amount the telegram was valued by the sender; there

being the usual provision for an assumption of a greater liability in the case of a higher valuation and the payment of a slightly increased rate, the amount of which increase had been approved by the Interstate Commerce Commission (44 I. C. C. 670, 677).

In the *Czizek* case, however, there was no error in the message. The message had never been sent at all; and not only that, but the company had mistakenly informed the sender, when he inquired, that it had been sent and had been delivered, thereby preventing him from ordering it repeated or duplicated, or making any further effort to communicate with the addressee. The circuit court of appeals had held that the conduct of the defendant amounted to gross negligence ("neither this testimony nor the findings of the court respecting it can be regarded as adequate to overcome this court's prior holding that *the case is one of gross negligence* on the part of the plaintiff in error for failure to transmit", Wolverton, J., 286 F. 478, 1923); and the question here was whether that circumstance was sufficient to support a recovery in excess of the amount of the valuation. This court said:

> "When the message is valued it may be doubted whether the valuation can be affected by the intensity of the vituperative epithet applied to an admitted fault. *Kirsch v. Postal Telegraph Cable Co.*, 100 Kan. 250, 252, 264 Pac. 267. At all events something more would have to be shown than is proved here to take the case out of the general rule. The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence. It was not a wilful wrong."

The first paragraph of the head-note in the Kirsch case, cited by Mr. Justice HOLMES, explicitly announces the conclusion that

> "an interstate telegraph company may by contract limit its liability for nondelivery of an unrepeated message to

the amount paid for its transmission, even in case of gross negligence."

The reason why this court in the *Czizek* case refused to permit recovery in excess of the valuation is plain, and there is no conceivable ground on which the State courts of Alabama could have been justified in refusing to recognize the authority of the *Czizek* case, at least to the extent of limiting the recovery here to $50, at which amount this plaintiff also valued his message. It is not so clear why, in the *Czizek* case, the liability was not limited under the unrepeated message clause to the amount received for sending the message. On this point Mr. Justice HOLMES said:

> "We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case. Unrepeated Message Case, 61 I. C. C. 541".

61 I. C. C. 541 must be read in connection with the prior opinion of the commission in the same proceeding, 44 I. C. C. 670, in which it was said, by way of comment on the difference between the two limitations of liability:

> "The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender *assumes the risk of error or delay* while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves." (44 I. C. C. 676).

We attribute the refusal of this court in the Czizek case to apply the unrepeated message stipulation in that case, with the effect of limiting the liability to the amount paid for the message, to its conclusion that in the special case of the mes-

sage tariffs then in force for the Western Union Telegraph Company that company had not undertaken or assumed to limit its liability for unrepeated messages except for mistakes and delays; and that in a case where the message had never been sent at all it was intended by the company to assume liability up to $50.00 and understood by the Interstate Commerce Commission that the $50 valuation clause was the only protection which the telegraph company would claim. This conclusion is reinforced by the fact that a different result had been reached by this court as to the tariffs of the Postal Telegraph-Cable Company, which formerly had no valuation clause, and relied solely on the unrepeated-message stipulation. In *Dickerson v. Western Union and Postal*, 74 So. 779, 114 Miss. 115, the complaint alleged that a message filed with the Postal Company had not been sent at all, through the Postal Company's "wilful, wanton, and gross neglect"; the Postal pleaded the unrepeated condition as a defense; the plea was demurred to and the demurrer overruled; the plaintiff having declined to plead further the complaint was dismissed; and the supreme court of Mississippi reversed the judgment of dismissal and held that the demurrer to the plea should have been sustained. After a new trial and judgment for the plaintiff and an affirmance by the supreme court of the State, 79 So. 719, the case was brought to this court on ceriorari and reversed with a per curiam opinion:

> "Per curiam. Reversed upon authority of *Postal Telegraph Cable Company v. Warren Godwin Lumber Company*, 251 U. S. 27; *Western Union v. Boegli*, 251 U. S. 315."

(254 U. S. 609, 1920). This case seems to have squarely presented the issue whether the unrepeated message stipulation, in the tariffs applicable to an interstate message, could be avoided by the allegation that the negligence was gross; and this court did not deem the matter worthy of a special opinion.

In the present case the only fault complained of is a simple error. The clause of the tariffs which limits liability for mis-

takes in unrepeated messages to the amount received for sending the same is intended to and does apply to this case if it applies to any case at all. It is not alleged or pretended that there was any wilful or wanton wrong. If the sender of an interstate message can escape from the limitation of liability which goes with the rate which he has selected and paid by the simple expedient of labeling the defendant's fault as "gross", the tariff limitation is of no value or significance whatever. The decisions of this Court that, on the contrary, it is valid and must be respected by the States are not to be evaded by any such transparent, not to say flimsy, device.

## III.

**There was no evidence that the negligence was "gross," as distinguished from simple, if that question were at all material.**

If there were any significance in the distinction between gross and simple negligence in this class of cases, this court, where the Federal question has been duly raised, would be permitted and required to examine the record for the purpose of seeing whether there was *any evidence* offered at the trial to support the conclusion that the negligence was gross as distinguished from simple.

The only evidence on that subject in this case is to be found in the testimony of the sending and receiving operators, called as witnesses by the defendant, and the testimony of a former operator named May, called as a witness for the plaintiff in rebuttal (Record, pages 101 to 108).

The sending operator testified that he sent the word in question as "fifty"; that an expert operator would know the difference between the symbols for *fifteen* and *fifty*, "but any experienced operator could make an error" (page 101). The receiving operator testified that he wrote the message down as he understood it, and that he understood the word in question

as "fifteen" (pages 103, 104.). Neither of these operators had any previous acquaintance with either the plaintiff or the addressee of the message, or had any anger, resentment or ill-feeling with regard to either of them (pages 99, 103.) The difference between the Morse symbols for "fifty" and "fifteen" was explained; but the receiving operator handled five hundred messages a day (page 105), and after hearing the sound of the telegraph instrument as the message comes over the wire that sound has to be translated in the operator's brain from a conventional symbol into an English word, which in turn the brain must direct the finger to imprint on paper by means of the typewriter (page 108).

The plaintiff's witness, the former operator, testified:

> "The symbol for the letter 'y' in fifty is entirely different from the symbols for the letters 'een'. * * * Any competent operator with experience can tell the difference between the symbols for the letter "y" and the letters 'een'. * * * If a message is sent with the word fifty spelled out and is transmitted over the wire with the apparatus in perfect working condition it would be received as *fifty*. It would not be received as *fifteen*." (P. 107.)

That was the plaintiff's whole case. If that shows gross negligence, what would ordinary negligence be? There is no pretense that the operators were generally incompetent or unskillful. The receiving operator had had about twelve years' experience (p. 103) and the sending operator a year and a half or two years (p. 101). The instrument in the receiving operator's office "was the best in use and in perfect condition" (page 106). The equipment in the sending office was "a recognized standard telegraph machine, the best in use" (page 99). Any wire, long or short, may be interrupted from a variety of causes—rain, wind or induction of some kind (page 107).

It is obvious that this is merely the ordinary case of an error in transmission, without any unusual features and with no element whatever of exaggerated culpability. What was proved here could be proved by the plaintiff in any case of error. Indeed it is remarkable if the plaintiff does not feel, like Lord Clive, that when his opportunities are considered he should be astounded at his own moderation. In substance, he has proved—what was never denied—that the error occurred, and that if both operators are competent and attentive such an error should not occur ordinarily. If it is said that this makes a prima facie case of simple negligence, that may be granted; but it is not gross negligence unless all negligence is gross negligence and unless this Court erred in its carefully-considered opinion in *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, and its reversal *per curiam* of W. U. Tel. Co. v. Southwick (*supra.*)

## IV.

**If the degree of negligence were at all material, it was fatal error to charge the jury that they might find the defendant liable if it failed to "Bestow the care and skill which the situation demanded"—i. e., if the defendant was guilty of nothing more than simple negligence.**

If the degree of negligence were of any importance, obviously the defendant was at least entitled to have the jury instructed as to the difference between the varying degrees of negligence, and that the defendant was not liable unless the jury should find that the plaintiff had shown by a preponderance of the evidence that the negligence was gross as distinguished from merely simple.

Instead of so charging, the trial court told the jury that "negligence is a failure to bestow the care and skill which the situation demands"; that the question which they were to de-

termine is "whether or not under the conditions and circumstances under which this message was delivered and transmitted, the defendant through its agents and servants did bestow the care and skill which the situation demanded they should bestow"; and that "if they did not the plaintiff would be entitled to recover the damages which the testimony * * * shows the plaintiff suffered by reason of the error or mistake of the defendant. That is all there is in the case." (Record, p. 111.)

To the giving of this charge the defendant duly excepted (page 113), as well as to the refusal of a charge that there was no evidence of gross negligence. (Pages 114, 116.)

In a case which was professedly being tried under the Federal rules of law, where the Federal question was repeatedly raised at each successive stage of the proceedings, it is obvious that the judgment would have to be reversed for this reason alone, even if the distinction between gross and simple negligence were to be recognized.

## V.

**In any event the plaintiff could not possibly have been entitled to more than $50, the amount at which the message was valued.**

As has been already pointed out, if the unrepeated-message stipulation were entirely out of the case, there is still no conceivable ground on which the refusal of the State court to follow the *Czizek* case can be supported. Certainly the fault of the defendant in the present case—a simple, every-day error occurring in the transmission from one ordinarily competent operator to another, was no more shocking than the complete failure in the *Czizek* case to put the message on the wire, accompanied by the mistaken statement to the sender that the message had in fact been sent, which the circuit court of ap-

peals had held was gross negligence. "The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence", said Justice Holmes in the *Cziszek* case. "It was not a wilful wrong." Certainly the error in the present case was no more wilful and not the less a mere inadvertence.

## CONCLUSION.

**The judgment should be reversed and the cause remanded to the appropriate State court for further proceedings not inconsistent with the Federal rule limiting the liability to the amount paid for the message.**

The reason for our doubt as to whether the writ of certiorari from this court should properly be addressed to the Court of Appeals of Alabama or to the Supreme Court of the State is as follows:

After the petition for certiorari to the Court of Appeals had been filed, it appeared from a memorandum published in the Southern Reporter (111 Sou. 199) that the Supreme Court of the State, in connection with its refusal to review the Court of Appeals, had handed down a short memorandum as follows:

> "Writ denied on authority of *Postal Tel. - Cable Company v. Minderhout*, 195 Ala. 420, 71 Sou. 91 (1916)."

The Minderhout case was one in which the supreme court of Alabama had announced that it *would not* issue certiorari to review the court of appeals except to review a conclusion reached by the court of appeals on a question of law, and specifically that it would not review the court of appeals "upon a finding of facts, or in the application of the law to the facts."

Since the supreme court of the state does not interpret Section 140 of the state constitution, conferring on it supervisory power over the court of appeals, as *prohibiting* review of the court of appeals on questions of fact or the application of the law to the facts, but has merely adopted as a matter of judicial policy the rule that it *will not* review the court of appeals on such questions, it seems clear that the procedure in this case is controlled by *Western Union Tel. Co., v. Crovo,* 220 U. S. 364, and *Norfolk Turnpike Company v. Virginia,* 225 U. S. 264, 269, and that, the supreme court of the state having refused to decide the case (for whatever reason), the writ from this court should run to the court of appeals.

The doubt proceeds from *Matthews v. Huwe,* 269 U. S. 262, where the *jurisdiction* of the highest state court depended on the existence of a Federal constitutional question and where it was held that the higher state court, in deciding that the record presented no debatable constitutional question and *therefore* that there was no jurisdiction, had in effect decided the case.

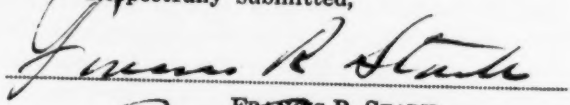
Whether this is so in the present case depends on the meaning, if any, to be attached to the memorandum of the supreme court of the state assigning as *the reason* for refusing to review the lower court, that it was "on the authority of *Postal Tel.-Cable Company v. Minderhout*" —*i.e.* that the supreme court of the state *would not* review the lower court on a question of fact or on the application of the law to the facts.

It occurred to us as among the possibilities that it might be urged in this court that in handing down this memorandum the Supreme Court of the State was in effect again deciding what it had already decided on the previous appeal in this case, that gross negligence invalidates the limitations of liability. If this view is admissible, then the Supreme Court again decided the case in holding that such was the law; and

on that theory the writ from this court should run to the Supreme Court of the State.

It seems to counsel for petitioner that, *whatever the reason*, the supreme court of the state refused to decide the case on the last appeal; that this memorandum means no more than the memorandum of the state court in the Crovo case, which stated that in its opinion the judgment "was plainly right"; and that the writ should run to the court of appeals, so that No. 916 should be reversed and remanded to the court of appeals, and No. 958 should be dismissed.

Respectfully submitted,



FRANCIS R. STARK,

RAY RUSHTON,

*Attorneys for Petitioner*

# APPENDIX.

## History of Telegraph Stipulations and Regulations Limiting Liability

For a long time even after the Interstate Commerce Commission was established it was not given any jurisdiction over telegraph companies. The Act to Regulate Commerce was enacted on February 4, 1887, but it was not until the amendatory Act of June 18, 1910, that telegraph and telephone companies were made subject to its provisions and declared to be common carriers within the meaning and purposes of the Act. By that amendment jurisdiction over the rates and charges of such companies was conferred upon the Commission, accompanied by the declaration that all such rates and charges must be reasonable and that any unjust rate or charge was unlawful. Section 15 of the Act as then amended authorizes the Interstate Commerce Commission in express language to hear complaints respecting rates and charges for the transmission of messages by telegraph and telephone and to hear complaints respecting classifications, regulations and any practices whatsoever of any carrier subject to the Act. Section 15 also provides that after the Commission has fixed the just and reasonable maximum rate or charge that may lawfully be enacted for the future by the carrier complained of, the latter shall not demand or collect any rate or charge in excess of the rate or charge so prescribed, and there is a proviso to Section 1 of the Act reading as follows:

> "Provided that messages by telegraph, telephone or cable subject to the provisions of this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable and different rates may be charged for the different classes of messages."

Prior to the 1910 Amendment liabilities of the telegraph companies varied throughout the different states in consequence of differing conclusions reached as to the common law principles involved, and several states had enacted statutes fixing liabilities, at variance with what the courts of the State had held to be the common-law liability of such companies. A number of states had also enacted penalty statutes. The purpose of the Act was to bring about uniformity, not only of rates and charges, but of rules, regulations, service, obligation and liabilities to the message-sending public. The companies are therefore at the present time working under rates, and liabilities which are a part of the rates, which have the force of law. The companies themselves can no more waive or vary the one than the other; and what the companies cannot do voluntarily they may not be compelled to do by the judgment of a State court.

The company is no longer permitted to decide for itself whether it shall settle a claim beyond the limitation of liability provided for by the tariff. Under the Federal statute if the Western Union Telegraph Company in this case had paid to Mr. Priester the amount of his loss, it would have subjected itself to a fine and its responsible officers to imprisonment.

In 1917, J. L. Cultra and Myrtle Cultra, partners, trading as the Clay County Produce Company, brought a suit in the courts of Jackson County in the State of Missouri against the Western Union Telegraph Company based on damages arising out of a telegram sent to them at Clay Center in the State of Kansas by some commission merchants at San Francisco. The telegraph company interposed as defense (a) that the court by the terms of the contract under which the message was sent was limited to an award of nominal damages only, even though the loss claimed was shown to have resulted from defendant's negligence in forwarding the message and (b) that the validity of the provisions in the contract restricting the defendant's liability to nominal damages was not within the

competency of the state court to deny, but presented a Federal question, which the Interstate Commerce Commission alone was authorized by law to consider and deal with. In the light of that contention the trial court held the case in abeyance pending a ruling by the Interstate Commerce Commission, and the questions presented to the Interstate Commerce Commission for decision were substantially as follows: (a) whether the Congress by the Act of June 18, 1910, amending the Act to Regulate Commerce, has vested in the Interstate Commerce Commission such jurisdiction over the rates and practices of telegraph companies as to bring under its control and within its regulating power the rules of such companies concerning their liability for damages incurred by reason of error or delay in the transmission or delivery of interstate messages; and (b) whether, if the Interstate Commerce Commission had such jurisdiction, the rules of the telegraph companies with respect to these matters were reasonable, and whether they were consistent with sound public policy. The message contract in the Cultra case was identical with the message contract in this case, except for the fact that in the Cultra case the despatch was a night letter and in this case a day message. The Commission on May 17, 1917, rendered an opinion in which, among other things, it said:

> "If, as a matter of law, as the complainants contend, the rate charged and collected for an unrepeated message carries with it the same protection to the sender or recipient and imposes upon the telegraph company the same liability and degree of care as the rate for a repeated message, then the express authority by the Congress to maintain classifications of repeated and unrepeated messages, with the different rates attached thereto, is *without significance* or effect; for no useful purpose would have been served in authorizing the two classifications taking different rates without recognizing the fundamental difference between them that for years has been well understood and maintained. It seems clear,

therefore, that the Congress in recognizing, by the amendment to the Act above quoted, these three classes of messages with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject of course to the general provisions in the Act requiring all rates, and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages with the different rates and liabilities attaching to them having affirmative recognition in the Act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant and upon all those who avail themselves of its services, until they have been lawfully changed * * * * *.

"Our conclusion upon the record is that the Congress, by the language used in the Amendatory Act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully attached, and as a fundamental feature of it, the *restricted liability* insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy but on the contrary are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful." 44 I. C. C. 670.

The opinion of the Interstate Commerce Commission in the *Cultra Case* was approved and its reasoning adopted by this

Court in the case of *Postal Telegraph Cable Company v. Warren-Godwin Lumber Company,* 251 U. S. 27, 64 L. Ed. 118. That case was before this Court on a writ of certiorari to the Supreme Court of Mississippi to review a judgment which reversed, with an instruction to enter judgment for the plaintiff, a judgment of the Circuit Court of Hines County in favor of the telegraph company in a suit against it for error in transmitting an unrepeated interstate message. The Supreme Court of Mississippi in the case of *Western Union Telegraph Company v. Showers,* 104 Miss. 411, 73 So. 276, had decided that the Act of June 18, 1910, had operated to exert the power of Congress over telegraph companies as to their interstate business and contracts, and that the unrepeated-message stipulation of the telegraph company was valid and enforceable. In a later case, *Dickerson v. Western Union Telegraph Company,* 114 Miss. 115, 74 So. 779, the Mississippi Court had held that the ruling previously made by it in the *Showers case* as to the operation of the Act of 1910 was erroneous, and in the case of *Postal Telegraph Company v. Warren-Godwin Lumber Company,* following its ruling in the *Dickerson case,* it decided against the validity of the unrepeated-message stipulation, and the case was brought before this Court by writ of certiorari. In the course of its opinion, this Court, speaking through Chief Justice WHITE, said:

> "In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish—a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be conflicting, local laws.

"In the second place, as in terms the Act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited, of course, by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the Primrose case, the right to contract on such subject was embraced within the grant of the primary rate-making power.

"In the third place, as the Act expressly provided that the telegraph, telephone or cable messages to which it related may be 'classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages', it would seem unmistakably to draw under the Federal control the very power which the construction given below to the Act necessary excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that, as pointed out by the Interstate Commerce Commission (*Cultra v. Western Union Telegraph Co.*, 44 Inters. Com. Rep. 670), from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

"But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the Act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the Eighth Circuit dealing with the same

subject (*Gardner v. Western Union Telegraph Co.* 145 C. C. A. 399, 231 Fed. 405) and by the numerous and conclusive opinions of state courts of last resort, which, in considering the Act of 1910 from various points of view, reached the conclusion that that Act was an exertion by Congress of its authority to bring under Federal Control the interstate business of telegraph companies, and therefore was an occupation of the field by Congress which excluded state action."

In the case of *Western Union Telegraph Company v. Boegli*, 251 U. S. 315, 64 L. Ed. 281, this Court had before it the validity of a State statute of Indiana imposing a penalty upon telegraph companies for failure to deliver telegrams, the message involved being an interstate one. This Court held the State statute to be without effect upon interstate messages, and in its opinion, again speaking through Chief Justice White, said:

> "We are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly established the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the Court below erred, therefore, in imposing the penalty fixed by the State statute."

The question was again before this Court in the case of *Western Union Telegraph Company v. Southwick*, 255 U. S. 565, 65 L. Ed. 788, involving, like the present case, an error in an interstate telegram. In a *per curiam* opinion the Court reversed and remanded the case for further proceedings "upon

the authority of *Postal Telegraph Cable Co. v. Warren-Godwin Lumber Company*, 251 U. S. 27, 64 L. Ed. 118; *Western Union Telegraph Co., v. Boegli*, 251 U. S. 315, 64 L. Ed. 381."

In the case of *Dickerson v. Western Union Telegraph Co.*, 114 Miss. 115, 74 So. 779, referred to by this Court in the opinion in the *Warren-Godwin Lumber Company case*, the Mississippi Court had had before it the validity of the unrepeated message stipulation as applied to a case wherein the plaintiff alleged "gross, wilful, and wanton negligence of the defendants" (Western Union Telegraph Company and Postal Telegraph Company, the suit being against the two Telegraph Companies jointly). As stated above, in that case the Supreme Court of Mississippi held that the Act of 1910 did not apply. The case as against the Western Union Telegraph Company was finally discontinued, but it was prosecuted to judgment against the Postal Telegraph Cable Company,—*Postal Telegraph Cable Company v. Dickerson*, 79 So. 719. A writ of certiorari from this Court was granted, and the judgment of the State court was reversed upon the authority of *Postal Tel. Cable Co. v. Warren-Godwin Lumber Co.* and *Western Union Telegraph Company v. Boegli, supra.* (*Postal Tel. Co. v. Dickerson*, 254 U. S. 609, 65 L. ed. 436.)

The case of *Western Union Telegraph Company v. Esteve Bros.*, 256 U. S. 566, 65 L. Ed. 1099, involved the application of the Telegraph Company's stipulations on file with the Interstate Commerce Commission to messages not written on the Company's blanks and where the contract of transmission was without specific reference to the rules and regulations of the telegraph company. The plaintiff in the lower court had recovered a verdict for $31,095.00, which was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit (268 Fed. 22). The Telegraph Company contended that since the message had not been repeated the verdict should be limited to the amount of toll paid. This Court, speaking by Mr. Justice BRANDEIS, said:

"The Act of June 18, 1910, Chap. 309, Sec. 7, 36 Stat. at L. 539, Comp. Stat., Secs. 993, 8563, 5 Fed. Stat. Anno. 2nd Ed. p. 1108, 4 Fed. Stat. Anno. 2nd ed. p. 337, broadened the scope of the Act to Regulate Commerce to include 'telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from a State * * * to any foreign country.' And whatever may have been the legal incidents of transmitting the message from Barcelona to Havre under Spanish and French law, the Western Union, in sending the message over its own lines from Havre to New Orleans, was governed by the proviisons of that Act. *Galveston H. & S. A. R. Co. v. Woodbury*, 254 U. S. 357, ante 301, 41 Sup. Ct. Rep. 114. In the third paragraph of Section 1 of the amended Act, Congress provided that messages might be 'classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates (might) * * * * * be charged for the different classes of messages.' Acting, in May, 1916, under the authority of that provision, the Western Union, by appropriate action, approved the tariff involved in the present case, and, by permission of the Interstate Commerce Comission, filed with it the tariff, including the provisions here in question. The company was not required so to do by the terms of the Act or by any order of the Commission; compare 25th Annual Report I. C. C. (1911) pp. 5, 6. But the rate, long before established, then formally adopted and filed, was thereafter the only lawful rate for an unrepeated message, and the limitation of liability became the lawful condition upon which it was sent. *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 30, 64 L. Ed. 118, 120, 40 Sup. Ct. Rep. 69; *Cultra v. Western Union Telegraph Co.*, 44 Inters. Com. Rep. 670, 674.

"The lawful rate having been established, the company was, by the provisions of Sec. 3 of the Act to Regulate

Commerce, prohibited from granting to any one an *undue preference or advantage* over the public generally. For as stated in *Postal Telegraph Cable Co. v. Warren-Godwin Lumber Co., supra,* 30, the 'Act of 1910 was designed to and did subject such companies, as to their interstate business, to the rule of equality and uniformity of rates'. If the general public, upon paying the rate for an unrepeated message, accepted substantially *the risk of error involved* in transmitting the message, the company could not, *without granting an undue preference or advantage, extend different* treatment to the plaintiff here. The limitation of liability was an inherent part of the rate. The company could *no more depart from it* than it could *depart from the amount charged for* the service rendered.

"The Act of 1910 introduced a *new principle* into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. *Before* the Act the companies had a *common-law liability,* from which they might or might not extricate themselves, according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the *whole duty* and the *whole liability* of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, *not, as before, a matter of contract,* by which a legal liability could be modified, but a matter of law, by which a *uniform liability* was imposed. Assent to the terms of the rate was rendered immaterial, because, when the rate is used, dissent is without effect. * * * * * . The repeated rate, offering greater accuracy and greater liability in case of error, was open to anyone who wished to pay the extra amount for extra security." (Italics supplied.)

As a result of the proceeding brought by J. L. and Myrtle Cultra against the Western Union Telegraph Company, before the Interstate Commerce Commission, that Commission entered into a general investigation of the practices of telegraph companies subject to the Interstate Commerce Act, with respect to adjusting claims for damages arising from error or delay in the transmission or delivery, or from non-delivery, of interstate messages, and the reasonableness of their rules limiting liability on the several classes of messages in accordance with the rate paid. The result of the investigation is found in 61 I. C. C. 541. In explaining the classes of messages offered by telegraph companies to the public the Commission said:

> "Briefly, they offer the sender his choice of three classes of messages, unrepeated, repeated, and valued, with different rates for each class, dependent upon the service to be performed and the liability to be assumed. As a condition attaching to the transmission of a message at the lowest, or unrepeated rate, it is stipulated that the company shall not be liable for mistakes, delays, or non-delivery beyond the amount received for sending it; and it appears that, unlike the Western Union, the Postal Company steadfastly adheres to that limitation. But to protect the sender against possible loss in the event of errors in transmission, the respondents offer the second, or repeated, class of messages at a rate one and one-half times the rate for the same message if unrepeated. For this additional rate they agree to assume liability to the extent of fifty times the rate paid, with a maximum liability in the case of the Western Union of $50. The third class of messages, for the transmission of which the rate charged is the repeated rate plus a surcharge of one-tenth of one per cent of the valuation, is designed to insure the sender against any loss within the value placed upon the message. To afford protection against extravagant claims for damages on account of errors or delays which a repe-

tition of the message would not have prevented, provision is made by the Western Union for a limitation of liability to $50.00, in practice applied both to unrepeated and repeated messages, and by the Postal Company, in the case of repeated messages, to fifty times the repeated rate, which, unless a greater value is declared, is the agreed value of the message This provision on the part of the Western Union is alleged to be necessary in jurisdictions where the unrepeated stipulation is held not to avail."

The Commission found that the Western Union had made a practice of settling or adjusting what it considered meritorious claims for loss arising from mistakes or delays in the transmission or delivery of messages in spite of its rules and regulations and that the Postal Company had strictly followed the limitations of liability imposed by the various rates offered to the public. The Commission condemned this practice on the part of the Western Union and ordered it to desist therefrom. In the course of its opinion the Commission said:

"At the hearing on March 1, 1920, the contention was urged that a telegraph company, as a common carrier, may not lawfully undertake by contract, rule, regulation, or in any manner to exempt itself from full liability for errors or delays in the transmission of messages, and that all such rules restricting the liability are void. This question is foreclosed by the decisions of the Supreme Court in the *Primrose Case* and in *Postal Telegraph-Cable Co. v. Warren-Godwin Co.*, 251 U. S. 27."

As a result of its investigation into the reasonableness of the rules and regulations of telegraph companies the Commission decided that the stipulation limiting recovery in the case of unrepeated messages to the toll paid and to fifty times the toll paid in the case of repeated messages would thenceforth be unreasonable, and as a result of this finding the tariffs of telegraph companies have been changed so that now the liabil-

ity in the case of a message for the transmission of which the unrepeated rate is charged is five hundred dollars, and for a message received for transmission at the repeated rate, but not specially valued, five thousand dollars. As this decision of the Commission was made after the sending of the message involved in this suit it of course has no application thereto. See 61 I. C. C. 541.

In the case of *Western Union Telegraph Company v. Czizek*, 272 Fed. 223, 286 Fed. 478, a judgment against a telegraph company on a verdict based upon gross negligence on the part of the defendant company in the handling of a message was sustained by the Circuit Court of Appeals for the Ninth Circuit. The message was never started on its journey, but by error of the receiving clerk was placed on the wrong hook. The telegram was an unrepeated message, and the Company pleaded among other defenses the unrepeated message stipulation and the fifty-dollar-valuation clause. The Circuit Court of Appeals held that neither of these stipulations applied where the telegraph company was guilty of *gross negligence*. On a writ of certiorari from this court, it reversed the judgment of the Circuit Court of Appeals—*Western Union Telegraph Co. v. Czizek*, 264 U. S. 281, 68 L. d. 682. Mr. Justice HOLMES said:

> "The moment that the message is received the contract attaches along with the responsibility, and the transit begins. We can perceive no legal distinction between that moment and the next, when the message is handed to a transmitting clerk, or that on which a copy is given to a boy at the further end. The hand that holds the paper technically is that of the company, but no more at the beginning than at the end; and as in fact it is that of servants, reasonable self-protection is allowed to the master against their neglects. One such self-protection sanctioned by the decisions is a valuation of the message, with liberty to the sender to fix a higher

value on paying more for it. *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148. The plaintiff finds no difficulty in valuing the message now. It was at least equally possible to value it when it was sent. See *Western Union Telegraph Co. v. Esteve*, 256 U. S. 566, 65 L. Ed. 1094, 41 Sup. Ct. Rep. 584; *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.* 251 U. S. 27, 64 L. Ed. 118, 40 Sup. Ct. Rep. 69.

"When the message is valued, it may be doubted whether the valuation can be affected by the intensity of the vituperative epithet applied to an admitted fault. *Kirsch v. Postal Telegraph Cable Co.* 100 Kan. 250, 252, 164 Pac. 267. At all events, something more would have to be shown than is proved here to take the case out of the general rule. The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence. It was not a wilful wrong. The answers to the inquiries were probably the natural consequence of the first error, and the second answer probably was too late to have had any effect upon the plaintiff's position. See *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 38 L. Ed. 882, 889, 14 Sup. Ct. Rep. 1098. With regard to the amount of the valuation, if it is too low now (Unrepeated Message Case, 61 Intrs. Com. Rep. 541), it was reasonable in 1917. (*Primrose v. Western Union Telegraph Co. supra; Unrepeated Message Case*, 44 Intrs Com. Rep. 670.) Whatever effect may be given to the judgment of the Commission in the latter case, it was not intended to be retroactive. The rules prescribed by the Commission were to be in effect on July 13, 1921.

"We have not adverted to the first clause of the exemptions limiting liability to the amount received for sending the message. Obviously, this has a narrower scope than the valuation clause, and we should hesitate to hold that

it exonerated the defendant in this case. *Unrepeated Message Case*, 61 *Intrs. Com. Rep.* 541."

The Court held that the plaintiff should be limited in his recovery to fifty dollars, the amount at which the message was valued.

# INDEX


| | Page |
|---|---|
| Argument | 5 |
| Cases believed to sustain Respondent's contention | 2 |
| Grounds denying Court's jurisdiction | 1 |
| Opinions in Courts below | 1 |
| Statement of the case | 2 |


LIST OF CASES CITED


Milwaukee & St. Paul Rly. Co. vs. Arms, et al, 91 U. S., 489 ..... 2, 5

Postal Teleg. Co. vs. Nichols, 159 F., 643 ..... 2, 6, 7

Priester v. W. U. Teleg. Co., 212 Ala., 271 ..... 2, 6

Primrose v. W. U. Teleg. Co., 154 U. S., 1 ..... 2, 5, 8, 9

Redington v. Pacific Postal Teleg. Co., 48 Amr. St. Rep. 132 ..... 2, 6

Southern Express Co. vs. Byers, 240 U. S., 612 ..... 2, 8

Strong v. W. U. Tel. Co., 30 L. R. A. (N. S.) 418 ..... 2, 6

Telegraph Co. vs. Griswold, 41 Amr. Rep., 500-506 ..... 2

Unrepeated Message Case, No. 8917, 44 I. C. C. 670 ..... 10, 12

Unrepeated Message Cases, 8917 and 11524, 61 I. C. C. 541 ..... 2, 11, 12

White, et al, vs. W. U. Teleg. Co., 14 F., 710 ..... 2, 6

W. U. Teleg. Co. vs. Crall, 38 Kan., 679 ..... 2, 7

W. U. Teleg. Co. vs. Czizek, 264 U. S., 281 ..... 2, 10

W. U. Teleg. Co. vs. Esteve Bros. Co., 256 U. S., 566 ..... 2, 5, 8

W U. Teleg. Co. vs. Howell, 38 Kan. 685 ..... 2, 7

25 R. C. L., 1054 and 1056 ..... 2, 9

26 R. C. L., 551-2 and 605 ..... 2, 7

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1926-27

---

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

C. H. PRIESTER,
Respondent.

---

## BRIEF OF RESPONDENT ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

---

Official Reports of Opinion Delivered in the Courts Below:

W. U. Tel. Co. v. Priester, 18 Ala. App. 531, 93 So. 231;
Priester v. W. U. Tel. Co., 20 Ala. App. 388; 102 So. 372;
Ex parte Priester, 212 Ala. 271; 102 So. 376;
W. U. Tel. Co. v. Priester, 111 So. 199. (Advance Sheet).

## GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS DENIED.

1. The action in the State Court was to recover damages for Petitioner's gross negligence in changing a telegram delivered to it at Greenville, Alabama, by respondent for transmission to J. K. Lewis, New Orleans, Louisiana, offering one thousand to fifteen hundred pounds of pecans for sale at fifty cents per pound, so as to read fifteen cents per

pound when delivered, causing an actual loss to respondent of $352.10, besides interest. In holding petitioner liable for gross negligence the decision of the State Courts is in accord with applicable decisions of this Court.

Petitioner's tariffs and classifications on file with the Inter-State Commerce Commission under the amendment to the Inter-State Commerce Act of June 18, 1910 (36 Stat. L. 539) did not authorize petitioner to contract against its gross negligence.

2. The rules and regulations of petitioner limiting its liability for damages for negligence in transmission of unrepeated messages to the amount of the toll paid were unreasonable and not binding on petitioner.

3. Cases believed to sustain resopndent's contention:

Milwaukee & St. Paul Rly. Co. vs. Arms, et al, 91 U. S. 489;
Postal Teleg. Co. vs. Nichols, 159 F. 643;
Priester v. W. U. Teleg. Co., 212 Ala. 271;
Primrose v. W. U. Teleg. Co., 154 U. S. 1;
Redington v. Pacific Postal Teleg. Co., 48 Amer. St. Rep. 132;
Southern Express Co. v. Byers, 240 U. S., 612;
Strong v. W. U. Teleg. Co., 30 L. R. A. (N. S.) 418;
Telegraph Co. v. Griswold, 41 Amer. Rep. 500-506;
White, et al, v. W. U. Teleg. Co., 14 F. 710;
W. U. Teleg. Co. v. Crall, 38 Kan. 679;
W. U. Teleg. Co. v. Esteve Bros. Co., 256 U. S. 566;
W. U. Teleg. Co. v. Howell, 38 Kan. 685;
25 R. C. L., 1054 and 1056;
26 R. C. L., 551-2 and 605;
Unrepeated Message Cases, 8917 and 11524, 61 I. C. C. 541.

## STATEMENT OF THE CASE

Respondent, through Southern Bell Telephone and Telegraph Company's office at Fort Deposit, phoned Petitioner's operator at Greenville, Alabama, for transmission to J.

K. Lewis Wholesale Produce Co., 411 Poydras Street, New Orleans, La., the following message:

> "Offer you thousand or fifteen hundred pounds Frotcher's pecans at fifty cents, f. o. b. Ft. Deposit. Answer. C. H. Priester." (R. pp. 49, 50 and 55)

It was correctly transmitted to petitioner's main office in New Orleans. From the main office it was sent by underground tube to Petitioner's operator, Dantoni, at its Cotton Exchange Branch in New Orleans. Dantoni wired it to Petitioner's operator, Engel, at its Board of Trade Office in New Orleans. (R. pp. 97-99)

Petitioner's operator, Dantoni, testified that when the message reached him through the tube it read fifty cents, that it went from Greenville to New Orleans, a distance of three hundred miles, alright, that the message was right before him and he knows he made no mistake in sending it to Engel, the other operator, three or four hundred yards away. (R. p. 100). He further states the message sent by him to Engel read fifty instead of fifteen. (R. p. 101).

Engel testifies he knew the difference between the symbols for fifteen and fifty, that if it had been sent to him as fifty he would have known the difference between fifty and fifteen. "I swear that I took it down correctly. I took it down fifteen and that is the way it was sent to me." (R. p. 104-105).

Dantoni testifies:

> "The symbols for the word fifty and the word fifteen so far as the "Y" in fifty and "EE" and "N" in fifteen are concerned—are entirely different. The sound is different. I can tell them distinctly. I know I did not make any mistake in sending that message. The message as sent by me read fifty instead of fifteen." (R. page 101).

Engel testifies:

> "There is a difference between the symbol for "EEN" in fifteen and the "Y" in fifty. They are entirely different and any competent operator can tell the difference. I was a competent operator. I took the

message down just as it came over the wire. I took it down exactly as it came. I cannot be mistaken as to that. I wrote it out just as I received it and just as shown on the carbon copy which I have identified." (R. p. 104).

C. C. May, an experienced operator, testified:

"The symbol for the letter "Y" is entirely different from the symbols for "EEN" and a competent operator would know the difference between the symbols for the letter "Y" and the letters "EEN". If a message is sent with the word fifty spelled out and is transmitted over the wire with the apparatus in perfect working condition it would be received as fifty. It would not be received as fifteen. Both instruments would make the same dot at the same time. A man touches the key and that makes an immediate impression of the letter in the receiving office. If fifteen is received the man from whom it is sent would send fifteen over the wire and if fifty was sent over the wire it would be fifty in the receiving office." (R. pp. 107-8).

The message when delivered to Lewis read fifteen cents instead of fifty cents, as originally given and received at Petitioner's main office in New Orleans and as sent through the tube to Dantoni. (R. p. 51). Receiving the message Lewis wired respondent accepting fifteen hundred pounds of the pecans. (R. p. 51).

Respondent, not knowing the message had been changed from fifty to fifteen cents per pound and understanding he was selling them at fifty cents per pound, filled the order with 1006 pounds of pecans. Later he received check from Lewis for $150.90, the price of the pecans at fifteen cents per pound. (R. pp. 51-3.)

Respondent's testimony shows the pecans were worth on the market, F. O. B. cars at Ft. Deposit, fifty cents per pound at the time the telegram was sent. His actual loss was thirty-five cents per pound, or $352.10. (R. p. 53).

Judgment for the respondent was rendered September 29, 1925, for $514.07. (R. pp. 44-5). This, under the in-

struction of the Court, included interest from December 16, 1919. (R. p. 38.)

The case was tried on counts 6 and 7 of the complaint, claiming petitioner was guilty of gross negligence. (R. pp. 20-21.)

## ARGUMENT.

This Court clearly lays down the proposition that the rules of the Telegraph Company relieving it from liability beyond the cost of sending the unrepeated message do not apply where the Company is guilty of wilful wrong or gross negligence.

Primrose v. W. U. Teleg. Co., 154 U. S. pp. 18 and 19.

In the case above cited, pages 18 and 19, Mr. Justice Grey quotes with approval from 78 Penn. St. 238, as follows:

> "By no device can a body corporate avoid liability for fraud, for wilful wrong or for the gross negligence, which, if it does not intend to occasion injury, is reckless of consequences and transcends the bounds of right with full knowledge that mischief may ensue."

In Western Union Telegraph Company v. Esteve Bros. & Co., 256 U. S., 569, this Court held that, by the Amendment of June 18, 1910, (36 Stat. L. 539), the Interstate Commerce Commission acquired jurisdiction over telegraph companies. It also held (256 U. S. 569) at that time, citing the Primrose case, that the classification of defendant's rates was reasonable in the absence of wilful misconduct or gross negligence.

In Milwaukee, etc. R. R. Co. v. Arms, et. al, 91 U. S. 495, the Court defined gross negligence as follows:

> "Gross Negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "Ordinary Negligence;" but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision was the result of gross negligence, because the employees of the company did not use the

care that was required to avoid the accident."

Following the above and other decisions of this Court, the Supreme Court of Alabama held that telegraph company's "failure to exercise that degree of care which the situation—its regulation included—demanded was gross negligence against which it could not contract."

Ex parte Priester, 212 Ala., 273.

In the well considered case of Strong vs. W. U. Tel. Co., 30 L. R. A. (N. S.) 418, the Court said:

> "In certain cases 'gross negligence' is evidently deemed the equivalent in legal contemplation of 'ordinary negligence'. In many cases, however, 'gross negligence' is used to denote a degree of carelessness greater than the degree implied by 'ordinary carelessness', and one of which the law takes distinct legal cognizance. It is thus used in those cases in which telegraph companies are permitted to limit their liability for losses, occurring through their ordinary carelessness, but at the same time are not permitted to limit their liability for losses occurring through their gross negligence."

In Postal Telegraph Cable Co. v. Nichols, 159 F., page 647, (unrepeated message) the Court held the Company was guilty of gross neglect on its part against which it could not contract.

In White vs. Western Union Telegraph Co., 14 F. page 710, the words "fifty July wheat" were substituted for "fifteen July wheat".

The Court charged the jury if the mistake was through the gross negligence of the defendant, or its agents, and plaintiff suffered damage, defendant would be responsible, although the message was not repeated, or its correct transmission insured.

In Redington vs. Pacific Postal Telegraph Cable Company, 48 Amr. St. Rep., 132, (unrepeated message) the word "nineteen" in the original message was changed to read "nine" when it was delivered, causing the amount of the attachment to be levied to read $903.00 instead of $1903.00. In line with the Federal cases we have cited, the

Court held the question of gross negligence was one for the jury and refused to disturb a verdict for damages against the Telegraph Company.

Other cases directly in point are Western Union Telegraph Co. vs. Crall, 38 Kan., page 679, and Western Union Telegraph Co. vs. Howell, 38 Kan., page 685.

A higher degree of care at the present time with improved perfected machinery, instruments, equipment, appliances and competent, careful and expert operators is now required of Telegraph Companies than could have been exacted in the early days of telegraphy. 26 R. C. L. 552.

The evident tendency on the part of the Courts is to adopt the principle that it is sufficient to render the Company liable for actual damages if the message shows on its face that it relates to a business transaction and that loss will probably result unless it is promptly and correctly transmitted. 26 R. C. L. 605.

In the case at bar the message disclosed on its face its importance. The amount of damages respondent sustained by changing the message from "fifty" to "fifteen" was thirty-five cents per pound for the pecans. This was a matter of calculation easy to make by either of Petitioner's operators. They were bound to know this damage would result if the message was altered. This required of them a higher degree of care than would have been exacted if the message was in cipher, or the language could not have been understood. Postal Telegraph Cable Co. vs. Nichols, 159 F., 647.

Neither Dantoni nor Engel attempts to explain how the alteration occurred. Each persists in saying he made no mistake. The testimony of one or the other is untrue. Without any explanation as to how the alteration occurred and each positive that he did not alter the message, the presumption is that whoever changed it did it intentionally upon the well known principle that a person is presumed to intend any act committed by him and the consequences resulting therefrom. If they did not use the care necessary to avoid the mistake they were guilty of gross negligence

as defined by this Court in the decisions we have cited. The record fails to affirmatively show this degree of care was exercised.

No decisions have been cited by petitioner showing that this Court has departed from the common law doctrine that a telegraph company cannot by contract exempt itself from liability for gross negligence on the part of its agents and servants, as announced in the Primrose case.

It is insisted that, since the amendment to the Interstate Commerce Act of June 18, 1910, (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, Petitioner's liability on account of an error made in the transmission of an unrepeated interstate message was limited to the amount paid for sending the message, regardless of the gross negligence of Petitioner's agents. This would destroy the common law principle announced in the Primrose case that telegraph companies cannot by contract relieve themselves from liability for the gross negligence. This Court has decided to the contrary. Southern Express Co. vs. Byers, 240 U. S., 612.

In the case cited, at page 614 the Court said:

> "Manifestly the shipment was interstate commerce; and under the settled doctrine established by our former opinions rights and liabilities in connection therewith depend upon Acts of Congress, the bills of lading and **common law principles** accepted and enforced by the Federal Courts."

In the instant case the sending of the telegram was interstate commerce. This being true, the principle above announced by this Court is directly applicable.

The different rates, rules and regulations for sending messages as prescribed by the Company were filed with the Interstate Commerce Commission and became effective with the Federal statutes.

> Western Union Tel. Co. vs. Esteve Bros. & Co., 256 U. S. 569.

They were previously held to be reasonable by this Court in the case of **Primrose vs. Western Union Tel. Co.,**

154 U. S. 1, in the absence of wilful misconduct or gross negligence. The law declared in the Primrose case, is quoted with approval in the case of Western Union Tel. Co. vs. Esteve Bros. & Co., 256 U. S. 569. A fair interpretation of this decision, as well as the other decisions of the Federal Courts relied on by respondent, leads to the conclusion that the classification of rates and the limitations upon the telegraph company's liability which were filed with the Interstate Commerce Commission were accepted by the Commission subject to the interpretation placed upon them in the Primrose case. Being so received, these rates and rules and regulations measured the liability of the telegraph company in all cases where there was an absence of wilful misconduct or gross negligence, as declared in the Primrose case. Petitioner can invoke these rates, rules and regulations only in those cases where it was not guilty of wilful misconduct, gross negligence or fraud.

The mere filing of the rates with the Interstate Commerce Commission did not give them any greater force than they had at the time of such filing and did not destroy the judicial interpretation placed upon them by this Court.

Unless the Interstate Commerce statutes expressly provide that these rates and classifications when filed with the Interstate Commerce Commission are the measure of all liability including wilful misconduct and gross negligence, and that the common law as declared by this Court, which awards damages for wilful misconduct, or gross negligence, has been repealed, the decision in the Primrose case governs.

> "It is not to be presumed that the legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such intention."

clearly indicates such intention." 25 R. C. L., page 1054.

It is also well settled that statutes in derogation of the common law are to be strictly construed. 25 R. C. L., page 1056.

In the case of Western Union Telegraph Co. vs. Czizek, 264 U. S. 281, the United States Circuit Court of Appeals held the telegraph company under the facts was guilty of gross negligence. This Court held under the facts that it was not guilty of gross negligence and was therefore protected by the rules and regulations. No other question was decided. This case is not in point. The other expressions in the opinion relied on by Petitioner were dictum.

The rules and regulations of Petitioner limiting its liability for damages for transmission of unrepeated messages to the amount of the toll paid and to not exceeding Fifty Dollars were unreasonable and not binding on respondent.

By the amendment of June 18, 1910 (36 Stat. L. 539) to the Interstate Commerce Act, the Interstate Commerce Commission was given jurisdiction over the rates and practices of Interstate Telegraph Companies, as well as the rules, regulations, conditions and restrictions affecting their interstate rates. This conferred upon the Commission the power to pass upon the reasonableness of the rules and regulations of Telegraph Companies. Cultra & Cultra, Trading as Clay County Produce Co. vs. Western Union Telegraph Co., Case No. 8917, 44 I. C. C., 670.

While, as above shown, this power has no application in cases of gross negligence, the statute conferred upon the Interstate Commerce Commission power to declare whether the rules prescribing the damages recoverable in unrepeated message cases were reasonable or unreasonable. Without an investigation of the facts and practices of the Telegraph Company upon which the rule was based, this Court held in the Primrose case and also in the Esteve Bros. Co. case, 256 U. S. 566, that the rule was reasonable.

The unrepeated message case, No. 8917, of Cultra & Cultra, trading as Clay County Produce Co., vs. Western Union Telegraph Co., was decided May 17, 1917. 44 I. C. C., 670. At that time the Interstate Commerce Commission held that the rules governing damages as to unrepeated messages had not been shown to be unreasonable or other-

wise unlawful. 44 I. C. C., 670.

It appears that the Commission was not satisfied with its decision. Referring to this as the "Unrepeated Message Case" the Interstate Commerce Commission, in cases No. 11524 and Unrepeated Message Case No. 8917, Cultra & Cultra, Trading as Clay County Produce Co. vs. Western Union Telegraph Co., 61 I. C. C. page 541, said:

> "In order that we might be informed whether the general practice of the Western Union, defendant in the Unrepeated Message Case, was in conformity with its published rules and also to obtain further information relative to the reasonableness of the rules, that proceeding was set down for further hearing. Further hearing was had on February 20, 1918."

It appears that on August 1, 1918, the President assumed control of the defendant company and it remained in the hands of the Government until August 1, 1919. For this reason the consideration of the evidence taken at the hearing of February 20, 1918, was held in abeyance. Thereafter, on March 1, 1920, a further hearing was had to ascertain whether changes had been made in the practices of the Company since the former hearing and to afford an opportunity to parties interested to present new facts bearing on the propriety of the rules.

It further appears from the decision above referred to that, although the Western Union Telegraph Co. had promulgated the rule limiting liability for damages in cases of unrepeated messages to the amount of toll paid for the message, its practice for a long number of years had been to pay the actual damages sustained and that the Company availed itself of the rule only in those cases where the claim was without foundation, or was unusually large.

It further appears from the opinion that prior to 1910 the rule was never observed and all claims for damages were referred to and dealt with by the Legal Department without reference to limited liability.

In 1913, after the amendment, claims were settled according to the discretion of the superintendents, or mana-

gers. Since then adherence to contractual limitations was not required and the restricted-liability provisions were not resorted to in the case of meritorious claims which were reasonable in amount.

Referring to the practice of the Company settling meritorious claims, the Commission said:

> "That practice as heretofore stated, contemplates full payment of claims by general superintendents, or general managers, up to $500.00, without submission to the Legal Department and without reference to the contractual defenses."

In summing up the Commission said:

> "Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non delivery, of unrepeated and repeated interstate messages are, and for the future will be, unreasonable." 61 I. C. C., 541.

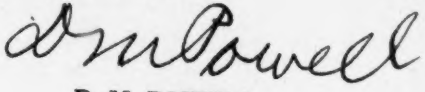
In the same opinion the Commission fixed the maximum liability in cases of unrepeated messages at $500.00. The message in the case at bar was sent December 16, 1919. Unrepeated Message Case No. 8917 was first decided May 17, 1917. 44 I. C. C., 670. The case was continued for further consideration and was pending at the time respondent's message was sent. If the rule was unreasonable in the Unrepeated Message Case, which was pending at the time respondent's message was sent, it was also unreasonable in respondent's case.

No matter of right authorizing the exercise of sound judicial discretion in Petitioner's behalf is here involved. The damages claimed by Respondent were less than five hundred dollars. Under the rulings and orders of the Interstate Commerce Comission the questions here involved, the amount in controversy being less than five hundred dollars, cannot arise in the future. Morally and legally the petition is without merit. Respondent's claim was small, but meritorious. Petitioner deserves no credit for its persistent efforts to defeat it. It has delayed payment more

than seven years, has put Respondent to the annoyance and expense of three jury trials, as well as three appeals, and now is forcing him to the further expense of defending his claim before the highest Court of the Nation.

We respectfully insist the petition should be denied.

Respectfully submitted.



D. M. POWELL,
Attorney for Respondent

POWELL & HAMILTON,
of Greenville, Alabama,
Of Counsel.

# INDEX


Page

Argument ..... 5

Cases believed to sustain Respondent's contention ..... 2

Grounds denying Court's jurisdiction ..... 1

Opinions in Courts below ..... 1

Statement of the case ..... 2


## LIST OF CASES CITED


Milwaukee & St. Paul Rly. Co. vs. Arms, et al, 91 U. S., 489 ..... 2, 5

Postal Teleg. Co. vs. Nichols, 159 F., 643 ..... 2, 6, 7

Priester v. W. U. Teleg. Co., 212 Ala., 271 ..... 2, 6

Primrose v. W. U. Teleg. Co., 154 U. S., 1 ..... 2, 5, 8, 9

Redington v. Pacific Postal Teleg. Co., 48 Amr. St. Rep. 132 ..... 2, 6

Southern Express Co. vs. Byers, 240 U. S., 612 ..... 2, 8

Strong v. W. U. Tel. Co., 30 L. R. A. (N. S.) 418 ..... 2, 6

Telegraph Co. vs. Griswold, 41 Amr. Rep., 500-506 ..... 2

Unrepeated Message Case, No. 8917, 44 I. C. C. 670 ..... 10, 12

Unrepeated Message Cases, 8917 and 11524, 61 I. C. C. 541 ..... 2, 11, 12

White, et al, vs. W. U. Teleg. Co., 14 F., 710 ..... 2, 6

W. U. Teleg. Co. vs. Crall, 38 Kan., 679 ..... 2, 7

W. U. Teleg. Co. vs. Czizek, 264 U. S., 281 ..... 2, 10

W. U. Teleg. Co. vs. Esteve Bros. Co., 256 U. S., 566 ..... 2, 5, 8

W U. Teleg. Co. vs. Howell, 38 Kan. 685 ..... 2, 7

25 R. C. L., 1054 and 1056 ..... 2, 9

26 R. C. L., 551-2 and 605 ..... 2, 7

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1926-27

---

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

C. H. PRIESTER,
Respondent.

---

## BRIEF OF RESPONDENT ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF ALABAMA.

---

Official Reports of Opinion Delivered in the Courts Below:

W. U. Tel. Co. v. Priester, 18 Ala. App. 531, 93 So. 231;
Priester v. W. U. Tel. Co., 20 Ala. App. 388; 102 So. 372;
Ex parte Priester, 212 Ala. 271; 102 So. 376;
W. U. Tel. Co. v. Priester, 111 So. 199. (Advance Sheet).

## GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS DENIED.

1. The action in the State Court was to recover damages for Petitioner's gross negligence in changing a telegram delivered to it at Greenville, Alabama, by respondent for transmission to J. K. Lewis, New Orleans, Louisiana, offering one thousand to fifteen hundred pounds of pecans for sale at fifty cents per pound, so as to read fifteen cents per

pound when delivered, causing an actual loss to respondent of $352.10, besides interest. In holding petitioner liable for gross negligence the decision of the State Courts is in accord with applicable decisions of this Court.

Petitioner's tariffs and classifications on file with the Inter-State Commerce Commission under the amendment to the Inter-State Commerce Act of June 18, 1910 (36 Stat. L. 539) did not authorize petitioner to contract against its gross negligence.

2. The rules and regulations of petitioner limiting its liability for damages for negligence in transmission of unrepeated messages to the amount of the toll paid were unreasonable and not binding on petitioner.

3. Cases believed to sustain resopndent's contention:

Milwaukee & St. Paul Rly. Co. vs. Arms, et al, 91 U. S. 489;
Postal Teleg. Co. vs. Nichols, 159 F. 643;
Priester v. W. U. Teleg. Co., 212 Ala. 271;
Primrose v. W. U. Teleg. Co., 154 U. S. 1;
Redington v. Pacific Postal Teleg. Co., 48 Amer. St. Rep. 132;
Southern Express Co. v. Byers, 240 U. S., 612;
Strong v. W. U. Teleg. Co., 30 L. R. A. (N. S.) 418;
Telegraph Co. v. Griswold, 41 Amer. Rep. 500-506;
White, et al, v. W. U. Teleg. Co., 14 F. 710;
W. U. Teleg. Co. v. Crall, 38 Kan. 679;
W. U. Teleg. Co. v. Esteve Bros. Co., 256 U. S. 566;
W. U. Teleg. Co. v. Howell, 38 Kan. 685;
25 R. C. L., 1054 and 1056;
26 R. C. L., 551-2 and 605;
Unrepeated Message Cases, 8917 and 11524, 61 I. C. C. 541.

## STATEMENT OF THE CASE

Respondent, through Southern Bell Telephone and Telegraph Company's office at Fort Deposit, phoned Petitioner's operator at Greenville, Alabama, for transmission to J.

K. Lewis Wholesale Produce Co., 411 Poydras Street, New Orleans, La., the following message:

> "Offer you thousand or fifteen hundred pounds Frotcher's pecans at fifty cents, f. o. b. Ft. Deposit. Answer. C. H. Priester." (R. pp. 49, 50 and 55)

It was correctly transmitted to petitioner's main office in New Orleans. From the main office it was sent by underground tube to Petitioner's operator, Dantoni, at its Cotton Exchange Branch in New Orleans. Dantoni wired it to Petitioner's operator, Engel, at its Board of Trade Office in New Orleans. (R. pp. 97-99)

Petitioner's operator, Dantoni, testified that when the message reached him through the tube it read fifty cents, that it went from Greenville to New Orleans, a distance of three hundred miles, alright, that the message was right before him and he knows he made no mistake in sending it to Engel, the other operator, three or four hundred yards away. (R. p. 100). He further states the message sent by him to Engel read fifty instead of fifteen. (R. p. 101).

Engel testifies he knew the difference between the symbols for fifteen and fifty, that if it had been sent to him as fifty he would have known the difference between fifty and fifteen. "I swear that I took it down correctly. I took it down fifteen and that is the way it was sent to me." (R. p. 104-105).

Dantoni testifies:

> "The symbols for the word fifty and the word fifteen so far as the "Y" in fifty and "EE" and "N" in fifteen are concerned—are entirely different. The sound is different. I can tell them distinctly. I know I did not make any mistake in sending that message. The message as sent by me read fifty instead of fifteen." (R. page 101).

Engel testifies:

> "There is a difference between the symbol for "EEN" in fifteen and the "Y" in fifty. They are entirely different and any competent operator can tell the difference. I was a competent operator. I took the

message down just as it came over the wire. I took it down exactly as it came. I cannot be mistaken as to that. I wrote it out just as I received it and just as shown on the carbon copy which I have identified." (R. p. 104).

C. C. May, an experienced operator, testified:

"The symbol for the letter "Y" is entirely different from the symbols for "EEN" and a competent operator would know the difference between the symbols for the letter "Y" and the letters "EEN". If a message is sent with the word fifty spelled out and is transmitted over the wire with the apparatus in perfect working condition it would be received as fifty. It would not be received as fifteen. Both instruments would make the same dot at the same time. A man touches the key and that makes an immediate impression of the letter in the receiving office. If fifteen is received the man from whom it is sent would send fifteen over the wire and if fifty was sent over the wire it would be fifty in the receiving office." (R. pp. 107-8).

The message when delivered to Lewis read fifteen cents instead of fifty cents, as originally given and received at Petitioner's main office in New Orleans and as sent through the tube to Dantoni. (R. p. 51). Receiving the message Lewis wired respondent accepting fifteen hundred pounds of the pecans. (R. p. 51).

Respondent, not knowing the message had been changed from fifty to fifteen cents per pound and understanding he was selling them at fifty cents per pound, filled the order with 1006 pounds of pecans. Later he received check from Lewis for $150.90, the price of the pecans at fifteen cents per pound. (R. pp. 51-3.)

Respondent's testimony shows the pecans were worth on the market, F. O. B. cars at Ft. Deposit, fifty cents per pound at the time the telegram was sent. His actual loss was thirty-five cents per pound, or $352.10. (R. p. 53).

Judgment for the respondent was rendered September 29, 1925, for $514.07. (R. pp. 44-5). This, under the in-

struction of the Court, included interest from December 16, 1919. (R. p. 38.)

The case was tried on counts 6 and 7 of the complaint, claiming petitioner was guilty of gross negligence. (R. pp. 20-21.)

## ARGUMENT.

This Court clearly lays down the proposition that the rules of the Telegraph Company relieving it from liability beyond the cost of sending the unrepeated message do not apply where the Company is guilty of wilful wrong or gross negligence.

Primrose v. W. U. Teleg. Co., 154 U. S. pp. 18 and 19.

In the case above cited, pages 18 and 19, Mr. Justice Grey quotes with approval from 78 Penn. St. 238, as follows:

> "By no device can a body corporate avoid liability for fraud, for wilful wrong or for the gross negligence, which, if it does not intend to occasion injury, is reckless of consequences and transcends the bounds of right with full knowledge that mischief may ensue."

In Western Union Telegraph Company v. Esteve Bros. & Co., 256 U. S., 569, this Court held that, by the Amendment of June 18, 1910, (36 Stat. L. 539), the Interstate Commerce Commission acquired jurisdiction over telegraph companies. It also held (256 U. S. 569) at that time, citing the Primrose case, that the classification of defendant's rates was reasonable in the absence of wilful misconduct or gross negligence.

In Milwaukee, etc. R. R. Co. v. Arms, et. al, 91 U. S. 495, the Court defined gross negligence as follows:

> "Gross Negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "Ordinary Negligence;" but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision was the result of gross negligence, because the employees of the company did not use the

care that was required to avoid the accident."

Following the above and other decisions of this Court, the Supreme Court of Alabama held that telegraph company's "failure to exercise that degree of care which the situation—its regulation included—demanded was gross negligence against which it could not contract."

Ex parte Priester, 212 Ala., 273.

In the well considered case of Strong vs. W. U. Tel. Co., 30 L. R. A. (N. S.) 418, the Court said:

> "In certain cases 'gross negligence' is evidently deemed the equivalent in legal contemplation of 'ordinary negligence'. In many cases, however, 'gross negligence' is used to denote a degree of carelessness greater than the degree implied by 'ordinary carelessness', and one of which the law takes distinct legal cognizance. It is thus used in those cases in which telegraph companies are permitted to limit their liability for losses, occurring through their ordinary carelessness, but at the same time are not permitted to limit their liability for losses occurring through their gross negligence."

In Postal Telegraph Cable Co. v. Nichols, 159 F., page 647, (unrepeated message) the Court held the Company was guilty of gross neglect on its part against which it could not contract.

In White vs. Western Union Telegraph Co., 14 F. page 710, the words "fifty July wheat" were substituted for "fifteen July wheat".

The Court charged the jury if the mistake was through the gross negligence of the defendant, or its agents, and plaintiff suffered damage, defendant would be responsible, although the message was not repeated, or its correct transmission insured.

In Redington vs. Pacific Postal Telegraph Cable Company, 48 Amr. St. Rep., 132, (unrepeated message) the word "nineteen" in the original message was changed to read "nine" when it was delivered, causing the amount of the attachment to be levied to read $903.00 instead of $1903.00. In line with the Federal cases we have cited, the

Court held the question of gross negligence was one for the jury and refused to disturb a verdict for damages against the Telegraph Company.

Other cases directly in point are Western Union Telegraph Co. vs. Crall, 38 Kan., page 679, and Western Union Telegraph Co. vs. Howell, 38 Kan., page 685.

A higher degree of care at the present time with improved perfected machinery, instruments, equipment, appliances and competent, careful and expert operators is now required of Telegraph Companies than could have been exacted in the early days of telegraphy. 26 R. C. L. 552.

The evident tendency on the part of the Courts is to adopt the principle that it is sufficient to render the Company liable for actual damages if the message shows on its face that it relates to a business transaction and that loss will probably result unless it is promptly and correctly transmitted. 26 R. C. L. 605.

In the case at bar the message disclosed on its face its importance. The amount of damages respondent sustained by changing the message from "fifty" to "fifteen" was thirty-five cents per pound for the pecans. This was a matter of calculation easy to make by either of Petitioner's operators. They were bound to know this damage would result if the message was altered. This required of them a higher degree of care than would have been exacted if the message was in cipher, or the language could not have been understood. Postal Telegraph Cable Co. vs. Nichols, 159 F., 647.

Neither Dantoni nor Engel attempts to explain how the alteration occurred. Each persists in saying he made no mistake. The testimony of one or the other is untrue. Without any explanation as to how the alteration occurred and each positive that he did not alter the message, the presumption is that whoever changed it did it intentionally upon the well known principle that a person is presumed to intend any act committed by him and the consequences resulting therefrom. If they did not use the care necessary to avoid the mistake they were guilty of gross negligence

as defined by this Court in the decisions we have cited. The record fails to affirmatively show this degree of care was exercised.

No decisions have been cited by petitioner showing that this Court has departed from the common law doctrine that a telegraph company cannot by contract exempt itself from liability for gross negligence on the part of its agents and servants, as announced in the Primrose case.

It is insisted that, since the amendment to the Interstate Commerce Act of June 18, 1910, (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, Petitioner's liability on account of an error made in the transmission of an unrepeated interstate message was limited to the amount paid for sending the message, regardless of the gross negligence of Petitioner's agents. This would destroy the common law principle announced in the Primrose case that telegraph companies cannot by contract relieve themselves from liability for the gross negligence. This Court has decided to the contrary. Southern Express Co. vs. Byers, 240 U. S., 612.

In the case cited, at page 614 the Court said:

> "Manifestly the shipment was interstate commerce; and under the settled doctrine established by our former opinions rights and liabilities in connection therewith depend upon Acts of Congress, the bills of lading and **common law principles** accepted and enforced by the Federal Courts."

In the instant case the sending of the telegram was interstate commerce. This being true, the principle above announced by this Court is directly applicable.

The different rates, rules and regulations for sending messages as prescribed by the Company were filed with the Interstate Commerce Commission and became effective with the Federal statutes.

> Western Union Tel. Co. vs. Esteve Bros. & Co., 256 U. S. 569.

They were previously held to be reasonable by this Court in the case of **Primrose vs. Western Union Tel. Co.,**

**154 U. S. 1, in the absence of wilful misconduct or gross negligence.** The law declared in the Primrose case, is quoted with approval in the case of Western Union Tel. Co. vs. Esteve Bros. & Co., 256 U. S. 569. A fair interpretation of this decision, as well as the other decisions of the Federal Courts relied on by respondent, leads to the conclusion that the classification of rates and the limitations upon the telegraph company's liability which were filed with the Interstate Commerce Commission were accepted by the Commission subject to the interpretation placed upon them in the Primrose case. Being so received, these rates and rules and regulations measured the liability of the telegraph company in all cases where there was an absence of wilful misconduct or **gross negligence,** as declared in the Primrose case. Petitioner can invoke these rates, rules and regulations only in those cases where it was not guilty of wilful misconduct, **gross negligence** or fraud.

The mere filing of the rates with the Interstate Commerce Commission did not give them any greater force than they had at the time of such filing and did not destroy the judicial interpretation placed upon them by this Court.

Unless the Interstate Commerce statutes expressly provide that these rates and classifications when filed with the Interstate Commerce Commission are the measure of all liability including wilful misconduct and gross negligence, and that the common law as declared by this Court, which awards damages for wilful misconduct, or gross negligence, has been repealed, the decision in the Primrose case governs.

> "It is not to be presumed that the legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such intention."
>
> clearly indicates such intention." 25 R. C. L., page 1054.

It is also well settled that statutes in derogation of the common law are to be strictly construed. 25 R. C. L., page 1056.

In the case of Western Union Telegraph Co. vs. Czizek, 264 U. S. 281, the United States Circuit Court of Appeals held the telegraph company under the facts was guilty of gross negligence. This Court held under the facts that it was not guilty of gross negligence and was therefore protected by the rules and regulations. No other question was decided. This case is not in point. The other expressions in the opinion relied on by Petitioner were dictum.

The rules and regulations of Petitioner limiting its liability for damages for transmission of unrepeated messages to the amount of the toll paid and to not exceeding Fifty Dollars were unreasonable and not binding on respondent.

By the amendment of June 18, 1910 (36 Stat. L. 539) to the Interstate Commerce Act, the Interstate Commerce Commission was given jurisdiction over the rates and practices of Interstate Telegraph Companies, as well as the rules, regulations, conditions and restrictions affecting their interstate rates. This conferred upon the Commission the power to pass upon the reasonableness of the rules and regulations of Telegraph Companies. Cultra & Cultra, Trading as Clay County Produce Co. vs. Western Union Telegraph Co., Case No. 8917, 44 I. C. C., 670.

While, as above shown, this power has no application in cases of gross negligence, the statute conferred upon the Interstate Commerce Commission power to declare whether the rules prescribing the damages recoverable in unrepeated message cases were reasonable or unreasonable. Without an investigation of the facts and practices of the Telegraph Company upon which the rule was based, this Court held in the Primrose case and also in the Esteve Bros. Co. case, 256 U. S. 566, that the rule was reasonable.

The unrepeated message case, No. 8917, of Cultra & Cultra, trading as Clay County Produce Co., vs. Western Union Telegraph Co., was decided May 17, 1917. 44 I. C. C., 670. At that time the Interstate Commerce Commission held that the rules governing damages as to unrepeated messages had not been shown to be unreasonable or other-

wise unlawful. 44 I. C. C., 670.

It appears that the Commission was not satisfied with its decision. Referring to this as the "Unrepeated Message Case" the Interstate Commerce Commission, in cases No. 11524 and Unrepeated Message Case No. 8917, Cultra & Cultra, Trading as Clay County Produce Co. vs. Western Union Telegraph Co., 61 I. C. C. page 541, said:

> "In order that we might be informed whether the general practice of the Western Union, defendant in the Unrepeated Message Case, was in conformity with its published rules and also to obtain further information relative to the reasonableness of the rules, that proceeding was set down for further hearing. Further hearing was had on February 20, 1918."

It appears that on August 1, 1918, the President assumed control of the defendant company and it remained in the hands of the Government until August 1, 1919. For this reason the consideration of the evidence taken at the hearing of February 20, 1918, was held in abeyance. Thereafter, on March 1, 1920, a further hearing was had to ascertain whether changes had been made in the practices of the Company since the former hearing and to afford an opportunity to parties interested to present new facts bearing on the propriety of the rules.

It further appears from the decision above referred to that, although the Western Union Telegraph Co. had promulgated the rule limiting liability for damages in cases of unrepeated messages to the amount of toll paid for the message, its practice for a long number of years had been to pay the actual damages sustained and that the Company availed itself of the rule only in those cases where the claim was without foundation, or was unusually large.

It further appears from the opinion that prior to 1910 the rule was never observed and all claims for damages were referred to and dealt with by the Legal Department without reference to limited liability.

In 1913, after the amendment, claims were settled according to the discretion of the superintendents, or mana-

gers. Since then adherence to contractual limitations was not required and the restricted-liability provisions were not resorted to in the case of meritorious claims which were reasonable in amount.

Referring to the practice of the Company settling meritorious claims, the Commission said:

> "That practice as heretofore stated, contemplates full payment of claims by general superintendents, or general managers, up to $500.00, without submission to the Legal Department and without reference to the contractual defenses."

In summing up the Commission said:

> "Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non delivery, of unrepeated and repeated interstate messages are, and for the future will be, unreasonable." 61 I. C. C., 541.

In the same opinion the Commission fixed the maximum liability in cases of unrepeated messages at $500.00. The message in the case at bar was sent December 16, 1919. Unrepeated Message Case No. 8917 was first decided May 17, 1917. 44 I. C. C., 670. The case was continued for further consideration and was pending at the time respondent's message was sent. If the rule was unreasonable in the Unrepeated Message Case, which was pending at the time respondent's message was sent, it was also unreasonable in respondent's case.

No matter of right authorizing the exercise of sound judicial discretion in Petitioner's behalf is here involved. The damages claimed by Respondent were less than five hundred dollars. Under the rulings and orders of the Interstate Commerce Comission the questions here involved, the amount in controversy being less than five hundred dollars, cannot arise in the future. Morally and legally the petition is without merit. Respondent's claim was small, but meritorious. Petitioner deserves no credit for its persistent efforts to defeat it. It has delayed payment more

than seven years, has put Respondent to the annoyance and expense of three jury trials, as well as three appeals, and now is forcing him to the further expense of defending his claim before the highest Court of the Nation.

We respectfully insist the petition should be denied.

Respectfully submitted.

D. M. POWELL,
Attorney for Respondent

POWELL & HAMILTON,
of Greenville, Alabama,
Of Counsel.

## SUBJECT INDEX


Page

Official Reports of Opinions Delivered in the Courts Below... 2
Grounds on which Jurisdiction of the Court is Denied..... 2
Cases Believed to Sustain Respondent's Contention..... 2
Statement of the Case..... 3
Summary ..... 5
Argument ..... 6


## TABLE OF CASES


Milwaukee & St. Paul Railway Company v. Armes, et al, 91 U. S. 489..... 2, 6
Postal Telegraph Company v. Nichols, 159F. 643..... 2, 7
Preston v. Prather, 137 U. S. 604..... 2, 7
Priester exparte v. Western Union Telegraph Company, 212 Ala., 271, 102 So. 376..... 2, 7
Primrose v. Western Union Telegraph Company, 154 U. S. 1..... 2, 6, 7, 9, 10, 11, 12, 14
Redington v. Pacific Postal Telegraph Company, 48 Am.
Southern Express Company v. Byers, 240 U. S. 612..... 3, 11
Southern Express Company v. Byers, 240 U. S. 612..... 3, 10
Strong v. Western Union Telegraph Company, 30 L. R. A. (N. S.) 418..... 3, 7
Telegraph Company v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500, 506..... 3
Unrepeated Message Case, 8917, 44 I. C. C. 670..... 14
Unrepeated Message Cases, 8917 and 11524, 61 I. C. C., 541..... 3, 14, 15, 16
Western Union Telegraph Co. v. Crall, 38 Kan. 679..... 3, 8
Western Union Telegraph Compay v. Czizek, 286 F. 478..... 12
Western Union Telegraph Company v. Czizek, 264 U. S. 281..... 13, 17
Western Union Telegraph Company vs. Esteve Bros. Co., 256 U. S. 566..... 3, 6, 11, 14
Western Union Telegraph Company v. Goodbar, et al, 7 So. 214 ..... 3, 8
Western Union Telegraph Company vs. Howell, 38 Kan. 685 ..... 3, 8
White v. Western Union Telegraph Company, 14F. 710..... 3, 8
25 Ruling Case Law, pp. 1054 and 1056..... 3, 12
25 Ruling Case Law, sec. 297, p. 1075..... 3, 12
26 Ruling Case Law, pp. 551-2 and 605..... 3, 9
Amendment to Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539)..... 5, 10, 12, 13, 14

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1927.
No. 916.

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

vs.

C. H. PRIESTER.

On Writ of Certiorari to the Court of Appeals of the State of Alabama. Petition for Certiorari filed February 21, 1927. Certiorari granted April 18, 1927.

No. 958.
WESTERN UNION TELEGRAPH COMPANY,
Petitioner

vs.

C. H. PRIESTER.

On Writ of Certiorari to the Supreme Court of the State of Alabama. Petition for Certiorari filed March 7, 1927. Certiorari granted April 18, 1927.

BRIEF OF D. M. POWELL,
FOR RESPONDENT.
(32,483)
(32,545)

## OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

Western Union Telegraph Company v. Priester, 18 Ala. App. 531, 93 So. 231;
Priester v. Western Union Telegraph Company, 20 Ala. App. 388, 102 So. 372;
Ex parte Priester, 212 Ala. 271, 102 So. 376;
Western Union Telegraph Company v. Priester, 21 Ala. App. 587, 111 So. 199;
Western Union Telegraph Company v. Priester, 215 Ala. 435, 111 So. 200.

## GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS DENIED.

Petitioner invokes the jurisdiction of this Court under the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539) and Petitioner's rules and regulations limiting its liability in damages for negligence in the transmission of unrepeated messages to the amount of the toll paid, filed with the Interstate Commerce Commission under said Act. This Act and Petitioner's rules and regulations do not apply because

(a) The action in the State Court was for gross negligence.

(b) Petitioner's rules and regulations limiting its liability were unreasonable where, as in Respondent's case, the amount of damages claimed was less than $500.00.

## CASES BELIEVED TO SUSTAIN RESPONDENT'S CONTENTION.

Milwaukee & St. Paul Railway Company v. Arms, et al., 91 U. S. 489;
Postal Telegraph Company v. Nichols, 159 F. 643;
Preston v. Prather, 137 U. S. 604;
Priester Exparte v. Western Union Telegrapm Company, 212 Ala. 271, 102 So. 376.
Primrose v. Western Union Telegraph Company, 154 U. S. 1;

Redington v. Pacific Postal Telegraph Company, 48 Am. St. Rep. 132;
Southern Express Company v. Byers, 240 U. S. 612;
Strong v. Western Union Telegraph Company, 30 L. R. A. (N. S.) 418;
Telegraph Company v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500, 506;
Unrepeated Message Cases, 8917 and 11524, 61 I. C. C. 541;
White, et al. v. Western Union Telegraph Company, 14 F. 710;
Western Union Telegraph Company v. Crall, 38 Kan. 679;
Western Union Telegraph Company v. Esteve Bros. Co., 256 U. S. 566;
Western Union Telegraph Company v. Goodbar, et al., 7 Southern 214;
Western Union Telegraph Company v. Howell. 38 Kan. 685;
25 Ruling Case Law, pp. 1054 and 1056;
25 Ruling Case Law, Section 297, p. 1075;
26 Ruling Case Law, pp. 551-2 and 605.

## STATEMENT OF THE CASE.

Respondent, through Southern Bell Telephone and Telegraph Company's office at Fort Deposit, phoned Petitioner's operator at Greenville, Alabama, for transmission to J. K. Lewis Wholesale Produce Co., 411 Poydras Street, New Orleans, La., the following message:

> "Offer you thousand or fifteen hundred pounds Frotcher's pecans at fifty cents, f. o. b. Ft. Deposit. Answer. C. H. Priester." (R. pp. 49, 50 and 55).

It was correctly transmitted to petitioner's main office in New Orleans. From the main office it was sent by underground tube to Petitioner's operator, Dantoni, at its Cotton Exchange Branch in New Orleans. Dantoni wired it to Petitioner's operator, Engel, at its Board of Trade Office in New Orleans. (R. pp. 97-99).

Petitioner's operator, Dantoni, testified that when the message reached him through the tube it read fifty cents, that it

went from Greenville to New Orleans, a distance of three hundred miles, alright, that the message was right before him and he knows he made no mistake in sending it to Engel, the other operator, three of four hundred yards away. (R. p. 100). He further states the message sent by him to Engel read fifty instead of fifteen. (R. p. 101).

Dantoni testifies:

"The symbols for the word fifty and the word fifteen so far as the 'Y' in fifty and 'EE' and 'N' in fifteen are concerned—are entirely different. The sound is different. I can tell them distinctly. I know I did not make any mistake in sending that message. The message as sent by me read fifty instead of fifteen." (R. p. 101).

Engel testifies:

"There is a difference between the symbol for 'EEN' in fifteen and the 'Y' in fifty. They are entirely different and any competent operator can tell the difference. I was a competent operator. I took the message down just as it came over the wire. I took it down exactly as it came. I cannot be mistaken as to that. I wrote it out just as I received it and just as shown on the carbon copy which I have identified." (R. p. 104).

"I sent this message out just like I took it down. The copy shows fifteen, and it was sent out that way. If the message had been sent to me over the wire as fifty I would have known the difference between fifty and fifteen. I swear that I took it down correctly. I took it down fifteen and that is the way it was sent to me." (R. p. 105.)

C. C. May, an experienced operator ,testified:

"The symbol for the letter 'Y' is entirely different from the symbols for 'EEN' and a competent operator would know the difference between the symbols for the letter 'Y' and the letters 'EEN.' If a message is sent with the word fifty spelled out and is transmitted over the wire with the apparatus in perfect working condition it would be received as fifty. It would not be received as fifteen. Both instruments would make the same dot at the same time. A man touches the key and that makes an immediate imperssion of the letter in the receiving office. If

fifteen is received the man from whom it is sent would send fifteen over the wire and if fifty was sent over the wire it would be fifty in the receiving office." (R. pp. 107-8).

The message when delivered to Lewis read fifteen cents instead of fifty cents, as originally given and received at Petitioner's main office in New Orleans and as sent through the tube to Dantoni. (R. p. 51). Receiving the message Lewis wired respondent accepting fifteen hundred pounds of the pecans. (R. p. 51).

Respondent, not knowing the message had been changed from fifty to fifteen cents per pound and understanding he was selling them at fifty cents per pound, filled the order with 1006 pounds of pecans. Later he received check from Lewis for $150.90, the price of the pecans at fifteen cents per pound. (R. pp. 51-3).

Respondent's testimony shows the pecans were worth on the market, F. O. B. cars at Ft. Deposit, fifty cents per pound at the time the telegram was sent. His actual loss was thirty-five cents per pound, or $352.10. (R. p. 53).

Judgment for the Respondent was rendered September 29, 1925, for $514.07. (R. pp. 44-5). This, under the instruction of the Court, included interest from December 16, 1919. (R. p. 38).

The case was tried on counts 6 and 7 of the complaint, claiming Petitioner was guilty of gross negligence. (R. pp. 20-21).

## SUMMARY.

1.

Respondent's case against Petitioner was for gross negligence in changing a telegram given it for transmission so as to make the offer of Respondent for the sale of his pecans to Lewis read **fifteen** cents per pound instead of **fifty** cents. The action being for gross negligence, the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539). extending the provisions of that Act to telegraph companies, does not apply.

2.

The regulation of petitioner limiting its liability for negligence and mistakes in the transmission of unrepeated messages to the toll paid therefor under the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. 1. 539), in cases where the amount of damages sustained was less than $500.00, was unreasonable and not binding on Respondent. This being true, Respondent was entitled to recover the damages actually sustained, the amount claimed being only $352.10.

## ARGUMENT.

1.

This Court clearly lays down the proposition that the rules of the Telegraph Company relieving it from Liability beyond the cost of sending the unrepeated message do not apply where the Company is guilty of wilful wrong or gross negligence.

Primrose v. W. U. Teleg. Co., 154 U. S. pp. 18 and 19.

In Western Union Telegraph Company v. Esteve Bros. & Co., 256 U. S., 569, this Court held that, by the Amendment of June 18, 1910 (36 Stat. L. 539), the Interstate Commerce Commission acquired jurisdiction over telegraph companies. It also held (256 U. S. 569) at that time, citing the Primrose case, that the classification of defendant's rates was reasonable, in the absence of wilful misconduct or gross negligence.

In Milwaukee, etc., R. R. Co. v. Arms, et al., 91 U. S. 495, the Court defined gross negligence as follows:

> "'Gross Negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'Ordinary Negligence'; but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident."

Announcing the general doctrine that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping, this Court, in the case of Preston v. Prather, 137 U. S. 608-9, said:

> "But gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived."

Gross negligence was not defined in the Primrose case, 154 U. S. 1, but we assume the Court must have had in mind the definition given in the Arms and Preston cases above cited. Be that as it may, the doctrine of gross negligence has been applied by both State and Federal Courts to cases where the facts were similar to the facts in this case.

Following the above and other decisions of this Court, the Supreme Court of Alabama held that telegraph company's "failure to evercise that degree of care which the situation—its regulation included—demanded was gross negligence against which it could not contract."

Ex parte Priester, 212 Ala. 273.

In the well considered case of Strong v. Western Union Telegraph Co., 30 L. R. A. (N. S.) 418, the Court said:

> "In certain cases 'gross negligence' is evidently deemed the equivalent in legal contemplation of 'ordinary negligence.' In many cases, however, 'gross negligence' is used to denote a degree of carelessness greater than the degre implied by 'ordinary carelessness', and one of which the law takes distinct legal cognizance. It is thus used in those cases in which telegraph companies are permitted to limit their liability for losses, occurring through their ordinary carelessness, but at the same time are not permitted to limit their liability for losses occurring through their gross negligence."

In Postal Telegraph Cable Co. v. Nichols, 159 F., page 647, (unrepeated message), the Court held the Company was guilty of gross neglect on its part against which it could not contract.

In White v. Western Union Telegraph Co., 14 F., page 710, the words "fifty July wheat" were substituted for "fifteen July wheat."

The Court charged the jury if the mistake was through the gross negligence of the defendant, or its agents, and plaintif suffered damage, defendant would be responsible, although the message was not repeated, or its correct transmission insured.

In Redington v. Pacific Postal Telegraph Company, 48 Am. St. Rep., 132 (unrepeated message), the word "nineteen" in the original message was changed to read "nine" when it was delivered, causing the amount of the attachment to be levied to read $903.00 instead of $1903.00. In line with the Federal cases we have cited, the Court held the question of gross negligence was one for the jury and refused to disturb a verdict for damages against the telegraph company.

In the case of Western Union Telegraph Company v. Goodbar, et al., 7 Southern 214, the message sent from Goodbar & Company to Stephens read as follows:

> "Cooper & Bone owe us account not due, six hundred and sixty-three dollars. Cooper & Hodges account past due, two hundred and five dollars. Attach or otherwise secure claims. See George S. Mitchell for bond. Answer." As delivered to Stephens the telegram read as follows:
>
> "Cooper & Bone owe us account not due, hundred and sixty-three dollars. Cooper & Hodges account past due, two hundred and five dollars. Attach or otherwise secure claims. See George S. Mitchell for bond."

It will be seen that the message was so altered in the transmission as to read **"hundred** and sixty-three dollars" instead of **"six hundred** and sixty-three dollars", as contained in the original message. There were other mistakes evidencing carelessness. The Supreme Court of Mississippi held that the defendant company wah guilty of gross negligence, that the verdict of the jury awarding the damages was supported by the testimony, and affirmed the judgment of the lower court.

Other cases directly in point are Western Union Telegraph Co. v. Crall, 38 Kan., p. 679, and Western Union Telegraph Co. v. Howell, 38 Kan., p. 685.

A higher degree of care at the present time with improved perfected machinery, instruments, equipment, appliances and competent ,careful and expert operators is now required of telegraph companies than could have been exacted in the early days of telegraphy.—26 R. C. L. 552.

The evident tendency on the part of the Courts is to adopt the principle that it is sufficient to render the company liable for actual damages if the message shows on its face that it relates to a business transaction and that loss will probably result unless it is promptly and correctly transmitted.—26 R. C. L. 605.

In the case at bar the message disclosed on its face its importance. The amount of damages respondent sustained by changing the message from "fifty" to "fifteen" was thirty-five cents per pound for the pecans. This was a matter of calculation easy to make by either of Petitioner's operators. They were bound to know this damage would result if the message was altered. This required of them a higher degree of care than would have been exacted if the message was in cipher, or the language could not have been understood. Postal Telegraph Cable Co. v. Nichols, 159 F. 647.

Neither Dantoni nor Engel attempts to explain how the alteration occurred. Each persists in saying he made no mistake. The testimony of one or the other is untrue. Without any explanation as to how the alteration occurred and each positive that he did not alter the message, the presumption is that whoever changed it did it intentionally upon the well known principle that a person is presumed to intend any act committed by him and the consequences resulting therefrom. If they did not use the care necessary to avoid the mistake they were guilty of gross negligence as defined by this Court in the decisions we have cited. The record fails to affirmatively show this degree of care was exercised.

In Primrose v. W. U. Tel. Co., 154 U. S. pp. 18 and 19, Mr. Justice Grey quotes with approval from 78 Penn. St. 238, as follows:

> "By no device can a body corporate avoid liability for fraud, for wilful wrong or for the gross negligence, which if it does not intend to occasion injury, is reckless of con-

sequences and transcends the bounds of right with full knowledge that mischief may ensue."

The message received by Dantoni thru the tube reads fifty cents. It was right before him when he wired it to Engel three hundred yards away. (R. p. 101.) He had full knowledge that mischief might ensue if he changed it to fifteen. If he wired it to Engel reading fifty, then Engel had full knowledge that mischief might ensue, if he sent it to Lewis reading fifteen instead of fifty. One of these men changed the message so as to read fifteen instead of fifty. The guilty one had full knowledge that mischief might ensue from the change. Possessing this knowledge, he could not have made the change without a reckless disregard of consequences and transcending the bounds of right. The State Court was fully justified under the testimony in submitting the question of gross negligence to the jury.

The message was relayed from Greenville to Atlanta and from there to the main office in New Orleans, more than seven hundred miles without mistake. (R. p. 102.) The distance from Dantoni's to Engel's office was only three hundred yards. They were experienced and competent operators. Their instruments were the best in use and in perfect condition. (R. 99 and 106.) It is not claimed there was anything wrong with the wires. One of these men changed the message. Under the facts disclosed he could not have done so without being guilty of gross negligence.

No decisions have been cited by Petitioner showing that this Court has departed from the common law doctrine that a telegraph company cannot by contract exempt itself from liability for gross negligence on the part of its agents and servants, as announced in the Primrose case.

It is insisted that, since the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539), under its tariffs and classifications on file with the Interstate Commerce Commission, Petitioner's liability on account of an error made in the transmission of an unrepeated interstate message was limited to the amount paid for sending the message. regardless of the gross negligence of Petitioner's agents. This would destroy the common law principle announced in the Primrose case that telegraph companies cannot by contract

relieve themselves from liability for their gross negligence. This Court has decided to the contrary. Southern Express Co. v. Byers, 240 U. S. 612.

In the case cited, at page 614, the Court said:

> "Manifestly the shipment was interstate commerce; and under the settled doctrine established by our former opinions rights and liabilities in connection therewith depend upon acts of Congress, the bills of lading and common law principles accepted and enforced by the Federal Courts."

In the instant case the sending of the telegram was interstate commerce. This being true, the principle above announced by this Court is directly applicable.

The different rates, rules and regulations for sending messages as prescribed by the company were filed with the Interstate Commerce Commission and became effective with the Federal statutes.

Western Union Tel. Co. v. Esteve Bros. & Co., 256 U. S. 569.

They were previously held to be reasonable by this court in the case of **Primrose v. Western Union Tel. Co., 154 U. S. 1, in the absence of wilful misconduct or gross negligence.** The law declared in the Primrose case, is quoted with approval in the case of Western Union Tel. Co. v. Esteve Bros. & Co., 256 U. S. 569. A fair interpretation of this decision, as well as the other decisions of the Federal Courts relied on by Respondent, leads to the conclusion that the classification of rates and the limitations upon the telegraph company's liability which were filed with the Interstate Commerce Commission were accepted by the Commission subject to the interpretation placed upon them in the Primrose case. Being so received, these rates and rules and regulations measured the liability of the telegraph company in all cases where there was an absence of wilful misconduct or gross negligence, as declared in the Primrose case. Petitioner can invoke these rates, rules and regulations only in those cases where it was not guilty of wilful misconduct, gross negligence or fraud.

The mere filing of the rates with the Inerstate Commerce Commission did not give them any greater force than they

had at the time of such filing and did not destroy the judicial interpretaiton placed upon them by this Court.

Unless the Interstate Commerce statutes expressly provide that these rates and classifications when filed with the Interstate Commerce Commission are the measure of all liability including wilful misconduct and gross negligence, and that the common law as declared by this Court, which awards damages for wilful misconduct, or gross negligence, has been repealed, the decision in the Primrose case governs.

> "It is not to be presumed that the legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such intention." 25 R. C. L., p. 1054.

It is also well settled that statutes in derogation of the common law are to be strictly construed.—25 R. C. L., p. 1056.

At the time of the passage of the Amendment to the Interstate Commerce Act of June 18, 1910 (36 Stat. L. 539) this Court, in the Primrose case, 154 U. S. 1, had judicially construed the regulation of the Western Union Telegraph Company limiting its liability for negligence in sending unrepeated messages to the amount of the toll paid, holding that this regulation was reasonable in the absence of wilful misconduct or **gross negligence.** This being true, the judicial construction of the regulation in the Primrose case was embodied in and became a part of the statute enacted June 18, 1910. The principle here invoked is analogous to the enactment of a statute which has received judicial construction.

> "It is a settled rule of statutory construction that when a statute or a clause or provision thereof has been construed by the court of last resort, of a State, and the same is substantially reenacted, the Legislature adopts such construction, unless the contrary is clearly shown by the language of the Act or the rules of statutory construction have been changed."—25 R. C. L., Sec. 297, p. 1075.

In the case of Western Union Telegraph Co. v. Czizek, 286F. 478, the United States Circuit Courts of Appeals held the telegraph company under the facts was guilty of gross

negligence. This Court held under the facts that it was not guilty of gross negligence and was therefore protected by the rules and regulations. No other question was decided. This case is not in point. The other expressions in the opinion relied on my Petitioner were dicta.—Western Union Tel. Co. v. Czizek, 264 U. S. 281.

The only special defense interposed by Petitioner in the State Court was that by the passage of the Amendment of June 18, 1910 (36 Stat. L. 539) to the Interstate Commerce Act, the Interstate Commerce Commission was given jurisdiction over the rates and practices of interstate telegraph companies, and that by reason of this fact Respondent was not entitled to recover for the gross negligence of the telegraph company because the regulations limited the liability in all cases, including gross negligence, to the toll paid for sending the message. It being shown that this defense does not apply to cases where the telegraph company is guilty of gross negligence, it follows that the matters set up in the special defense were no answer to the action for gross negligence and that the State Court correctly held that the demurrer on this ground was good and properly disallowed the plea. The only other plea in the case was the general issue. This, of course, did not raise a Federal question.

2.

The Amendment of June 8, 1910 (36 Stat. L. 539) to the Interstate Commerce Act contains the following provision:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."—36 Stat. L. 545.

The Act also contains the following provision:

> "that messages by telegraph, telephone or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial,

press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."—36 Stat. L. 545, 546.

The Courts have held that the right above conferred on telegraph companies carried with it authority to adopt reasonable rules and regulations relating to the classification and sending of messages. Where such rules and regulations were reasonable they were of course binding. But from the very language of the statute, where the rules and regulations were unreasonable, they were of course not binding.

In the absence of facts showing the contrary this Court, in the Primrose case, 154 U. S. 1, held that the regulation of the Western Union Telegraph Company limiting its liability for damages to the amount of the toll paid for negligence in sending an unrepeated message was reasonable. Had it been disclosed that in cases where the amount of damages was less than $500.00 it was the rule and practice of the telegraph company to settle the damages actually sustained, regardless of the printed regulations, we feel safe in saying this Court would never have held that the regulation was reasonable. To have done so would have allowed the company to take advantage of its own wrong and invoke a regulation which was never applied, except in cases without merit.

Without an investigation of the facts and practices of the telegraph company upon which the rule was based, this Court held, in the Esteve Bros. & Co. case, 256 U. S. 566, that the rule was reasonable.

The unrepeated message case, No. 8917, of Cultra & Cultra, trading as Clay County Produce Co., vs. Western Union Telegraph Co., was decided May 17, 1917. 44 I. C. C. 670. At that time the Interstate Commerce Commission held that the rules governing damages as to unrepeated messages had not been shown to be unreasonable or otherwise unlawful.—44 I. C. C. 670.

It appears that the Commission was not satisfied with its decision. Referring to this as the "Unrepeated Message Case" the Interstate Commerce Commission, in cases No. 11524 and Unrepeated Message Case No. 8917, Cultra & Cultra, Trading as Clay County Produce Co. v. Western Union Telegraph Co., 61 I. C. C., p. 451, said:

"In order that we might be informed whether the general practice of the Western Union, defendant in the Unrepeated Message case, was in conformtiy with its published rules and also to obtain further information relative to the reasonableness of the rules, that proceeding was set down for further hearing. Further hearing was had on February 20, 1918."

It appears that on August 1, 1918, the President assumed control of the defendant company and it remained in the hands of the Government until August 1, 1919. For this reason the consideration of the evidence taken at the hearing of February 20, 1918, was held in abeyance. Thereafter, on March 1, 1920, a further hearing was had to ascertain whether changes had been made in the practices of the company since the former hearing and to afford an opportunity to parties interested to present new facts bearing on the propriety of the rules.

It further appears from the decision above referred to that, although the Western Union Telegraph Co. had promulgated the rule limiting liability for damages in cases of unrepeated messages to the amount of toll paid for the message, its practice for a long number of years had been to pay the actual damages sustained and that the company availed itself of the rule only in those cases where the claim was without foundation, or was unusually large.

It further appears from the opinion that prior to 1910 the rule was never observed and all claims for damages were referred to and dealt with by the Legal Department without reference to limited liability.

In 1913, after the Amendment, claims were settled according to the discretion of the superintendents, or managers. Since then adherence to contractual limitations was not required and the restricted-liability provisions were not resorted to in the case of meritorious claims which were reasonable in amount.

Referring to the practice of the Company settling meritorious claims, the Commission said:

"That practice as heretofore stated, contemplates full payment of claims by general superintendents, or general managers, up to $500.00, without submission to the

Legal Department and without reference to the contractual defenses."—61 I. C. C. p. 549.

In summing up the Commission said:

"Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non-delivery, of unrepeated and repeated interstate messages are, and for the future will be, unreasonable."—61 I. C. C. p. 550.

The decision of the Interstate Commerce Commission declaring the regulation as to unrepeated messages unreasonable was rendered May 3, 1921 (61 I. C. C. 645). The original judgment in favor of Respondent against Petitioner was rendered September 29, 1925 (R. 24), more than four years after the rule invoked by Petitioner had been declared unreasonable. As shown by the findings in the Unrepeated Message Cases, from which we have quoted above, the facts upon which the rule had been declared unreasonable had existed for a long time prior to December 16, 1919, the date the message in the case at bar was sent. At that time and prior thereto, as shown by the findings of the Interstate Commerce Commission ,it was the uniform practice of the Western Union Telegraph Company to settle all meritorious claims where the damages claimed were less than $500.00. This was the practice continuously up to the decision of the Interstate Commerce Commission of May 3, 1921. At the same date the Commission adopted a regulation which fixed the maximum amount of liability in cases of unrepeated messages at $500.00. This was in accordance with the practice of the Western Union Telegraph Company covering a long period of years whereby they settled meritorious claims of less than $500.00 upon the principles of equity and justice. In adopting the regulation, the Commission simply declared what had really been the rule of the Western Union Telegraph Company for a long number of years. In declaring that the rule limiting liability to the value of the toll paid where the message was not repeated was unreasonable, the Interstate Commerce Commission simply gave effect to what the telegraph company had really, by its action and practice, declared for a long number of years. The action of the Commission, in fixing the

maximum amount of liability at $500.00 where the message was not repeated, based, as it was, on the usage of the telegraph company over a long number of years, was a declaration, in effect, that the Company, in settling claims upon their merits and according to justice and equity, was right. It would be a travesty on justice to say that under these facts the Petitioner should be allowed to interpose as a defense a regulation which, in cases where the claim was just and less than $500.00, it had uniformly disregarded for a long period of years prior to the time the message in the case at bar was sent. Surely the courts should not allow it to take advantage of its own wrong by invoking the letter of a regulation and claiming that it had the force and effect of law, although the facts showing it to be unreasonable and upon which it was declared unreasonable were in existence prior to the sending of Respondent's message. It has always been the policy, and rightfully so, of our courts to give effect to the spirit rather than the letter of the law, "for the letter killeth, but the spirit giveth life." Second Corinthians, Chap. 3, 6.

It is true that it was held in the case of Western Union Telegraph Co. v. Czizek, 264 U. S. 285, that the rules prescribed by the Commission were to take effect on July 18, 1921, and that they were not retroactive. But this in no way affects our contention. The amount of the judgment in that case was $4500.00. Respondent is not insisting that he is entitled to his recovery under the new regulation adopted by the Interstate Commerce Commission to take effect July 13, 1921. His insistence is that at the time of the adoption of this rule the Interatate Commerce Commission also declared that the rule or regulation of the telegraph company limiting its liability to the toll paid was unreasonable, and that by reason of this finding, based upon facts which were in existence at the time Respondent's message was sent, the rule was unreasonable and inoperative as to Respondent. If the facts upon which the rule was declared unreasonable existed at the time Respondent's message was sent, the regulation was of course unreasonable at that time. The finding of the Commission was merely the announcement of a condition that had existed for a long number of years. It was analogous to the decision of a Court declaring a law unconstitutional. The

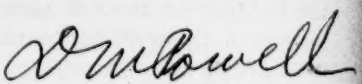
decision in such case would not only be effective at the time it was rendered, but it would relate back and destroy all rights that might have been claimed or asserted under the void Act prior to the decision. The very language of the amendatory Act of June 18, 1910 (36 Stat. L. 539, 545-6) is to the effect that the charges of the telegraph company must be reasonable, and if unjust or unreasonable, they are unlawful, and that the different rates to be charged for messages must also be just and reasonable.

We therefore respectfully insist that the regulation invoked by petitioner was unreasonable at the time the message was sent, and having been so declared by the Interstate Commerce Commission more than four years prior to the trial of the case in the Court below, Petitioner could not invoke it as a defense.

No matter of right authorizing the exercise of sound judicial discretion in Petitioner's behalf is here involved. The damages claimed by Respondent were less than $500.00. Under the rulings and orders of the Interstate Commerce Commission the questions here involved, the amount in controversy being less than $500.00, cannot arise in the future. Morally and legally the petition is without merit. Respondent's claim was small, but meritorious. Petitioner deserves no credit for its persistent efforts to defeat it. It has delayed payment more than eight years, has put Respondent to the annoyance and expense of three jury trials, as well as three appeals, and now is forcing him to the further expense of defending his claim before the highest Court of the Nation.

We respectfully insist the petition should be denied.

Respectfully submitted,



D. M. POWELL,
Attorney for Respondent.

POWELL & HAMILTON,
of Greenville, Alabama,
Of Counsel.

# SUPREME COURT OF THE UNITED STATES.

Nos. 183 and 189.—October Term, 1927.

| | | |
|---|---|---|
| 183 | Western Union Telegraph Company, Petitioner, *vs.* C. H. Priester. | On Writ of Certiorari to the Court of Appeals of the State of Alabama. |
| 189 | Western Union Telegraph Company, Petitioner, *vs.* C. H. Priester. | On Writ of Certiorari to the Supreme Court of Alabama. |

[February 20, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent delivered to petitioner a message for transmission over its telegraph lines from a point in Alabama to a point in Louisiana by which respondent offered to sell to the addressee a quantity of pecans at fifty cents per pound. In the message as transmitted the word "fifteen" was substituted for the word "fifty". Respondent, who in consequence of the error suffered damage in the sum of $[illegible]2.10, brought suit in the Circuit Court of Butler County, Alabama, to recover for petitioner's negligence in failing to transmit the message as given. The company pleaded that (a) as the message was not a repeated message its liability was limited to the amount received for sending it, by the terms of the tariffs and classifications filed with the Interstate Commerce Commission under Act of June 18, 1910, c. 309, § 1 and (b) as the message was not sent as a specially valued message the liability of the company was limited to $50 by the filed tariffs and classifications. Relevant parts of the tariff are printed in the margin.[1]

[1] "ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS.

"To guard against mistakes or delays, the sender of a message should order it repeated, that is telegraphed back to the originating office for comparison. For this one-half the unrepeated message rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED MESSAGE AND

The demurrers to the pleas were overruled and judgment given for the defendant, the petitioner here, which was reversed by the state Court of Appeals, 18 Ala. App. 532, on the authority of *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566. Upon an amended complaint charging gross negligence a trial was had resulting in a verdict and judgment for the plaintiff for nominal damages, which was affirmed by the Court of Appeals on the ground that the evidence did not establish gross negligence and that the trial court had rightly withdrawn that question from the jury. 20 Ala. App. 388. The Supreme Court of Alabama reversed the judgment of the Court of Appeals, ruling that although the filed tariff was a bar to the recovery of damages resulting from negligence, as decided in the *Esteve* case, it did not preclude a recovery for gross negligence and that on the evidence the jury should have been allowed to say whether the negligence of the defendant was gross. *Ex parte Priester*, 212 Ala. 271. On a retrial, judgment was again given for the plaintiff for the full amount demanded. This was affirmed by the Court of Appeals which, following the previous opinion of the state Supreme Court, held that the tariff was not a defense to an action for damages resulting from gross negligence. 21 Ala. App. 587. The state Supreme Court denied certiorari, 215 Ala. 435. This Court granted certiorari. Jud. Code, 237 (b); 274 U. S. 727.

Through abundance of caution petitioner filed separate petitions here, which were granted, asking that writs of certiorari be directed

---

PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the message and the Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of an unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for non-delivery of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this message is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof."

respectively to the Court of Appeals and to the Supreme Court. But as the Supreme Court of Alabama, by denying the petition for certiorari, on the face of the record did not pass on the merits, the writ of this Court in number 183 was properly directed to the Court of Appeals, and that in number 189 is dismissed. *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, 269; *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364; compare *Matthews* v. *Huwe*, 269 U. S. 262.

In *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1, relied upon by the Supreme Court of Alabama in the earlier appeal as supporting its distinction between ordinary negligence and gross negligence, a contract between the telegraph company and its patron, limiting the liability of the company if the message was not repeated, was upheld as a defense to an action seeking recovery for the negligent transmission of the message. Although it is suggested in the opinion (pp. 17-19) that as a matter of public policy the company would not have been permitted to stipulate away its liability for gross negligence, the distinction was neither involved in the case nor applied by the Court, nor has it been so applied. See *Philadelphia & Reading R. R.* v. *Derby*, 14 How. 468, 485, 486; *Steamboat New World* v. *King*, 16 How. 469, 474; *Milwaukee & St. Paul Ry.* v. *Arms*, 91 U. S. 489, 493-495.

Since the decision in the *Primrose* case the telegraph companies have been brought under the provisions of the Interstate Commerce Act and their tariffs for all interstate service made subject to the approval of the Interstate Commerce Commission. Interstate Commerce Act § 1, as amended by Act of June 18, 1910, c. 309, § 7, 36 Stat. 539. By § 1 of the Interstate Commerce Act it is provided that subject to the approval of the Commission messages received by telegraph companies for transmission may be classified into "repeated, unrepeated . . . and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages." The established rates for unrepeated messages thus became the lawful rates and the attendant limitation of liability became the lawful condition upon which messages might be sent. *Unrepeated Message Case*, 44 I. C. C. 670; *Western Union Telegraph Co.* v. *Esteve Bros. & Co., supra*, 571; *Postal Telegraph-Cable Co.* v. *Warren-Godwin Co.*, 251 U. S. 27; *Western Union Telegraph Co.* v. *Boegli*, 251 U. S. 315;

*Western Union Telegraph Co.* v. *Czizek*, 264 U. S. 281. What had previously been a matter of common law liability, with such contractual restrictions as the states might permit, then became the subject of federal legislation to secure reasonable and just rates for all without undue preference or advantage to any. Since that end is attainable only by adherence to the approved rate, based upon an authorized classification, that rate "represents the whole duty and the whole liability of the company." *Western Union Telegraph Co.* v. *Esteve Bros. & Co., supra.* Such being the basis of liability, we do not perceive any adequate ground upon which it may be enlarged merely by the application of a "vituperative epithet" to the admitted fault of the petitioner. *Milwaukee & St. Paul Ry.* v. *Arms, supra*, 494. For if it be assumed that we can weigh and measure degrees of negligence and that a public service company may not by contract alone limit its liability for gross negligence, so-called, nevertheless we may not disregard a lawful exercise of the regulatory power which has made no distinction between degrees of negligence, nor may we, upon any theory of public policy, annex to the rate as made conditions affecting its uniformity and equality.

The message here was unrepeated and the loss resulted from a mistake in transmission. The case thus comes within the express provision of clause 1 of the tariff, limiting the liability to the amount received for the service.

The cause will be reversed and remanded for further proceedings not inconsistent with this opinion.

*Reversed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*